93-1

No. _____

Supreme
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In The

Supreme Court of the United States

October Term, 1992

JAMES R. LAVESPERE,

Petitioner,

versus

NIAGARA MACHINE & TOOL WORKS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

The questions presented for review in this case are:

1. Whether the decisions below, the Fifth Circuit Court rulings from August 13, 1990, and March 26, 1993, decided under diversity jurisdiction improperly and unconstitutionally failed to apply state law?

2. Whether the decisions below, the Fifth Circuit rulings from December 18, 1990 and March 26, 1993, improperly applied Federal Rule of Civil Procedure 60(b)?

3. Whether the decisions below, the Fifth Circuit rulings from August 13, 1990, December 18, 1990, and March 26, 1993, improperly deprived James R. Lavespere of his constitutionally protected property right?

4. Whether the decisions below, the Fifth Circuit rulings from August 13, 1990, December 18, 1990, and March 26, 1993, decided under diversity jurisdiction improperly and unconstitutionally applied the principles of *Erie Railroad Co. v. Tompkins*?

II. LIST OF ALL INTERESTED PARTIES

Petitioner: James R. Lavespere

Respondent: Niagara Machine Tool Works, Inc.

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V. REFERENCE TO OFFICIAL AND UNOFFICIAL OPINIONS BELOW

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Ruling from United States Court of Appeals, Fifth Circuit, Honorable J. Edith M. Jones, March 26, 1993.

VI. JURISDICTION OF THE COURT

The jurisdiction of this Honorable Court is established by 28 U.S.C. § 2101(c). Petitioner's Motion for Relief from Judgment was denied on March 26, 1993. It is this ruling that petitioner wishes to have reviewed.

Petitioner filed a Motion for Reconsideration with the Fifth Circuit on April 8, 1993; however, this Motion has not been ruled on and does not interrupt the time in which to apply for certiorari review from this Honorable Court.

VII. APPLICABLE STATUTES

1. 28. U.S.C.A. Rule 60(b)(5)(6):

> On motion and upon such terms that are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:. . . .
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is

based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; (6) any other reason justifying relief from the operation of the judgment.

2. U.S. Const. amend. V:

No Person shall be . . . deprived of life, liberty, or property, without due process of law.

3. La. Const., art. I, § 2:

No person shall be deprived of life, liberty, or property, except by due process of law.

VIII. STATEMENT OF THE CASE

A. Statement of the Facts:

On August 20, 1985, petitioner, an 18 year old recent high school graduate, was working as a new employee in training for Baker Manufacturing Company, a furniture manufacturing company in Pineville, Louisiana. During the second day of operation of a press brake manufactured by respondent, the press cycled unexpectedly, traumatically amputating the young man's eight fingers.

Respondent manufactured and placed the machine into the stream of commerce. Despite voluminous historical documentation of similar injuries since the Industrial Revolution, respondent failed to place point of operation guards or safety devices on its line of industrial presses (punch presses, press brakes and power presses). Instead, respondent relied on "custom of the industry," which delegated to purchasers the responsibility of installing point of operation guards to protect the hands of operators.

Petitioner brought suit alleging strict products liability for failure to incorporate available safety devices at the time of manufacture, or subsequently, which would have reduced substantially, or eliminated, the risk of petitioner's accident. The Louisiana rule of strict liability in tort imposed upon manufacturers of unreasonably dangerous products, in effect on the date of the accident, eliminated legislatively by the Louisiana Products Liability Act of 1988 ("LPLA"), was

applied to this case by the district court and was assumed by all the parties to apply to this action. Without notice, however, for the first time on appeal in 1989 the Fifth Circuit *sua sponte* applied the new law retroactively at a time when Louisiana appellate courts had already uniformly held that LPLA was not retroactive. The Fifth Circuit refused to remand, or to certify the issue of retroactivity of LPLA to the Louisiana Supreme Court.

To date, almost eight years after the accident, James R. Lavespere has not been given an opportunity to have his day in court.

B. Course of Proceedings and Disposition in Courts Below

1. The District Court:

On August 20, 1986, petitioner filed suit in the Western District of Louisiana, Alexandria Division, to recover damages for the amputation of his fingers by the unguarded machine manufactured by respondent. Petitioner alleged that the failure to guard the press brake rendered the device defective under product liability laws.

The due process and *Erie Railroad Co. v. Tompkins* issues before this Court arise from respondent's motion for summary judgment. On July 11, 1988, two months *before* the effective date of LPLA, respondent filed a motion for summary judgment, alleging that it did not owe petitioner a duty to guard the press brake and that, on the facts of this case, the failure of petitioner's employer to prevent the harm by guarding the press brake was a superseding cause of the accident. The district court, on November 1, 1988, denied respondent's motion, finding genuine issues of material fact precluded judgment as a matter of law. (District Court's Judgment, attached hereto as Exhibit "A")

Shortly thereafter, on January 31, 1989, respondent reurged its motion based upon a recent Louisiana appellate decision involving a different product and accident. On February 10, 1989, petitioner filed an opposition distinguishing the recent case. In an unexpected turn of events, on February

15, 1989, the district court granted respondent's motion, ruling that the press brake was not defective as a matter of law. Petitioner filed a timely motion for reconsideration pursuant to Federal Rule Civil Procedure 59(e). Petitioner's motion for reconsideration was denied on February 23, 1989.

The district court's judgment, granting respondent's motion for summary judgment, was signed on February 28, 1989. (District Court's Judgment, attached hereto as Exhibit "B"). On March 10, 1989, petitioner filed his first supplemental motion for reconsideration. This motion was denied on March 15, 1989.

On March 16, 1989, petitioner filed a notice of appeal.

2. The Court of Appeals:

The Fifth Circuit Court of Appeals affirmed the district court's ruling, for reasons not advanced by that court, on August 13, 1990. *Lavespere v. Niagra Machine & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990) ("Lavespere I") (attached hereto as Exhibit "C"). Petitioner filed an application for rehearing on August 27, 1990, in which he argued that the Fifth Circuit's ruling was contrary to established Louisiana law and thus violated the principals of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The Fifth Circuit denied rehearing, with written reasons, on December 18, 1990. *Lavespere v. Niagra Machine & Tool Works, Inc.*, 920 F.2d 259 (5th Cir. 1990) ("Lavespere II") (attached hereto as Exhibit "D").

On March 4, 1993, Petitioner filed, in the Fifth Circuit, a Motion For Relief From Judgment Under Federal Rule of Civil Procedure 60(b) and Brief In Support thereof. On March 26, 1993, the Fifth Circuit, through United States Circuit Judge Edith H. Jones, issued the following order:

> IT IS ORDERED that appellant's Motion For Relief From Judgment Under Federal Rule of Civil Procedure (60b) is DENIED.

Believing this ruling to be erroneous, petitioner filed a Motion for Reconsideration on April 8, 1993. To date, this Motion has not been ruled on by the Fifth Circuit. Petitioner

requests, therefore, that this Court stay any action on this application until the Fifth Circuit rules on his Motion For Reconsideration.

3. Louisiana Jurisprudence:

Louisiana jurisprudence, subsequent to the 1990 Fifth Circuit rulings, has affirmed petitioner's contentions. On June 21, 1991, the Supreme Court of Louisiana handed down *Gilboy v. American Tobacco Co.*, 582 So.2d 1263 (La. 1991), stating that LPLA, *in toto*, is not retroactive. *Id.* at 1264. In so doing, however, the Supreme Court of Louisiana did not specifically address the exact issue presented in *Lavespere*. Given the Fifth Circuit's earlier pronouncements, petitioner felt his case not ripe for 60(b) review and chose to delay his motion pending further clarification. This clarification came by way of *Page v. Gilbert* on March 31, 1992, in which the court expressly held that *Lavespere* was incorrectly decided by the Fifth Circuit. *Page v. Gilbert*, 598 So.2d 1110 (La.App. 4th Cir. 1992). *Page* did not become final until October 16, 1992, when the Supreme Court of Louisiana denied writs of review. *Page v. Gilbert*, 598 So.2d 1110 (La.App. 4th Cir.), *writ denied*, 605 So.2d 1146 (1992). Not until this time did petitioner have adequate cause to believe his motion for relief would be granted by the Fifth Circuit. Shortly thereafter, on December 21, 1992, plaintiff settled his worker's compensation claims.

IX. ARGUMENT AND AUTHORITIES

A. Propriety of Review On Writ Of Certiorari

The Court may exercise discretionary jurisdiction to grant review on writ of certiorari only for "special and important reasons." Sup. Ct.R. 10.1. The Court does not exercise that discretion "for the benefit of the particular litigants," and does so only when the issues presented are "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897 (1955). As is evident from reviewing this Application for

Certiorari, this case presents the requisite "special and important reasons" meriting review.

The character of reasons that will be considered by this Court are present when:

> (1) A United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; and (2) [a United States Court of Appeals] has so far departed from the accepted and usual course of judicial proceedings,. . . . as to call for an exercise of this Court's power of supervision. Sup. Ct.R. 10.1(a).

In this case, these considerations are clearly present. The Fifth Circuit's ruling is in direct contradiction with the Tenth Circuit's ruling in *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975), *cert. denied*, 423 U.S. 1079, 96 S.Ct. 866, 47 L.Ed.2d 89 (1976), and virtually *every* pronouncement by this Court and the federal appellate courts regarding the proper application of state law by a federal court sitting in diversity jurisdiction. Perhaps more importantly, the Fifth Circuit deprived petitioner of his constitutionally protected property rights absent any due process protections. The resolution of this matter by the Fifth Circuit is so manifestly unjust and inequitable that it, in effect, violates our entire system of equity and justice.

B. Petitioner is entitled to an order under Rule 60(b) vacating the Fifth Circuit's judgment and reversing the district court's summary dismissal.

1. Rule 60(b) allows for relief based upon an error or change in law.

Rule 60(b)(6) provides:

> On motion and upon such terms as are *just*, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason *justifying* relief from the operation of the judgment. 28 U.S.C.A. Rule 60(b)(6) (West, 1992) (emphasis added).

Rule 60(b)(6) has been repeatedly referred to as a "grand reservoir of equitable power to do justice in a particular case."[1] Because the rule has as its ultimate objective the just application of law, Rule 60 should be liberally construed. Any case presenting a question of substantial rights, therefore, should be resolved in favor of setting aside the judgment, particularly where equitable considerations are involved and where a party has been denied an opportunity to have his or her case decided on the merits after a fair hearing.[2] More specifically, where a case involves a claim for relief on the basis of subsection (b)(6), Rule 60 is to be liberally construed to accomplish justice.[3]

Relief from judgment under Rule 60(b)(6) is an extraordinary remedy and may only be granted in exceptional circumstances.[4] Rule 60(b)(6) has been repeatedly invoked, however, when circumstances dictate, to remedy a mistake in the application of the law.[5] This is particularly applicable when the mistake at issue unjustly deprives a party of his day in court. Rule 60(b)(6), moreover, has been used to vacate judgments when a change in the law dictates a different result.[6]

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[1] *Radack v. Norwegian America Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir. 1963); Wright & Miller, *Federal Practice and Procedure*, Civil § 2852 (1973).

[2] *Johnson Waste Materials v. Marshall*, 611 F.2d 593 (5th Cir. 1980); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981); *Fackelman v. Bell*, 564 F.2d 734 (5th Cir. 1977); *U.S. v. McDonald*, 86 F.R.D. 204 (D.Ct.Ill. 1980); *In re Cremidas' Estate*, 14 F.R.D. 15 (D.C. Alaska, 1953); *Wright & Miller*, § 2852.

[3] *U.S. v. McDonald*, 86 F.R.D. 204 (D.Ct. Ill. 1980).

[4] *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co., Inc.*, 909 F.2d 1437 (10th Cir. 1990); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202 (7th Cir. 1984); *Morace v. St. Louis Southwestern R.R. Company*, 489 F.2d 632 (8th Cir. 1974).

[5] *Overbee v. Van Waters & Rogers*, 765 F.2d 578 (6th Cir. 1985); *Ritter v. Smith*, 811 F.2d 1398 (11th Cir.), *cert. denied*, 483 U.S. 1010, 107 S.Ct. 3242, 97 L.Ed. 2d 747 (1987); *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977); *First American Nat'l Bank v. Bonded Elevator, Inc.*, 111 F.R.D. 74 (W.D.Ky. 1986).

[6] *See, Pierce v. Cook & Co., supra*; *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), *cert. denied*, 400 U.S. 829, 91 S.Ct. 59, 27 L.Ed.2d 59 (1970); *Maryland v. Casualty Company*, 326 F.2d 275 (5th Cir.), *cert. denied*, 377

As is the case with all equitable remedies, the parameters of Rule 60(b)(6) are best understood when reviewed in the context of its application to specific instances. Cases deciding whether to invoke the "grand reservoir of equitable power" afforded by Rule 60(b)(6) are legion. For purposes of this motion for relief, James Lavespere offers the cases discussed below.[7]

2. Particular applications of Rule 60(b) to error or change in law situations.

In *Tsakonites v. Transpacific Carrier Corp.*, 322 F.Supp. 722 (S.D. N.Y. 1970), plaintiff was denied his day in court by a determination that his contacts with the United States were insufficient to maintain application of the Jones Act. Five years later, the United States Supreme Court overruled the rationale on which the lower courts dismissed plaintiff's claims. On this basis, plaintiff sought relief, claiming that the judgment dismissing his original suit should be vacated under Rule 60(b)(6). In response, defendants objected claiming that the case had already been decided and that the interests of finality should prevail. *Id.* at 724.

After reviewing the parties' arguments, the district judge held:

> I believe it to be in the interest of justice in the exceptional circumstances in this case to grant Tsakonites his day in court now that the Supreme Court appears to have overruled the previous decisions against him. *Id.* at 725.

This ruling clearly supports the proposition that a court's erroneous application of the law, even if rendered in a final judgment more than five years before the application for

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U.S. 932, 84 S.Ct. 1335, 12 L.Ed.2d 296 (1964); *Watson v. Symons Corp.*, 121 F.R.D. 351 (N.D. Ill. 1988); *First American Nat'l Bank v. Bonded Elevator, Inc.*, 111 F.R.D. 74 (W.D. Ky. 1986); *Factors, Etc., Inc. v. Pro Arts, Inc.*, 541 F.Supp. 231 (S.D. N.Y. 1982); *Tsakonites v. Transpacific Carriers Corp.*, 322 F.Supp. 722 (S.D. N.Y. 1970).

[7] These cases are offered for illustrative purposes only, and are not, in any way, being presented as an exhaustive listing of all 60(b)(6) equitable remedy cases.

60(b)(6) relief, is sufficient to sustain a motion for relief from judgment. Again, the objective of Rule 60(b) is to do substantial justice.

Another case illustrating the application of 60(b)(6), in the context of subsequent change in law, is *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975), *cert. denied*, 423 U.S. 1079, 96 S.Ct. 866, 47 L.Ed.2d 89 (1976). In *Pierce* two sets of plaintiffs sought relief for injuries arising from a common vehicular accident. One set of plaintiffs proceeded in state court, while the claims of the second set were removed to federal court. In the federal proceedings the district court sustained summary judgment in defendant's favor and the appellate court affirmed. The court of appeals decision became final in 1971. *Id.* at 722. The federal courts, sitting in diversity, granted summary judgment in favor of defendant on the basis of an Oklahoma State Court decision, *Marion Machine Foundry & Supply Co. v. Duncan*, 187 Okl. 160, 101 P.2d 813 (1940).

Meanwhile, the state court plaintiffs continued to pursue their claims in the state forum. Three years later, in 1974, the state supreme court overruled *Marion Machine* and ruled in plaintiffs' favor. In response to the Oklahoma Supreme Court's opinion, the federal court plaintiffs, more than three years after their case became final, filed a Rule 60(b)(6) motion for relief from judgment directly to the appellate court that rendered the initial judgment affirming the district court's summary dismissal. The *Pierce* court expressly recognized the propriety of plaintiffs' direct motion for relief to the appellate court. *Pierce v. Cook & Co.*, 518 F.2d at 722.

Applying the principles of Rule 60(b)(6), the Tenth Circuit found it was *Erie*-bound to vacate the original judgment, despite the fact that the decision had been final for three years. *Id.* at 723. According to the court, "[i]n diversity jurisdiction cases the results in federal court should be substantially the same as those in state court litigation arising out of the same transaction or occurrence." *Id.* The court placed great emphasis on the fact that the federal courts gave plaintiffs "substantially different treatment than that received in

state court by another injured in the same accident." *Id.* In the end, relief was warranted because the "outcome determination principle mandated by *Erie v. Tompkins* has been violated." *Id.*

Of course, a motion for relief from judgment based on a claim of legal error or change in law, unaccompanied by extraordinary or exceptional circumstances, is not cognizable under Rule 60(b)(6).[8] Nevertheless, relief from judgment is appropriately granted when there is error in the application of the law or a change in the law combined with the presence of exceptional circumstances. *See, Pierce v. Cook & Co., supra*; *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), *cert. denied*, 400 U.S. 829, 91 S.Ct. 59, 27 L.Ed.2d 59 (1970)(court reconsidered its earlier decision and modified it in accordance with new state court decision); *Maryland v. Casualty Company*, 326 F.2d 275 (5th Cir. 1964), *cert. denied*, 377 U.S. 932, 84 S.Ct. 1335, 12 L.Ed.2d 296 (1964) (court will correct initial opinion where a controlling state court has made a decision that the court was wrong); *Watson v. Symons Corp.*, 121 F.R.D. 351 (N.D. Ill. 1988) (court may relieve a party from an unappealed adverse judgment on the grounds that the judgment relied on case law which was subsequently overruled); *First American Nat'l Bank v. Bonded Elevator, Inc.*, 111 F.R.D. 74 (W.D. Ky. 1986) (in light of subsequent state court decision, court set aside its original ruling six years after the ruling); *Factors, Etc., Inc. v. Pro Arts, Inc.*, 541 F.Supp. 231 (S.D. N.Y. 1982) (court of appeals can rehear case in light of subsequent state law); *Tsakonites v. Transpacific Carriers Corp.*, 322 F.Supp. 722 (S.D. N.Y. 1970).

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[8] *See generally, Pierce v. United Mine Workers of America Welfare and Retirement Fund for 1950 and 1974*, 770 F.2d 449 (6th Cir. 1985), *cert. denied*, 474 U.S. 1104, 106 S.Ct. 890, 88 L.Ed.2d 925 (1986).

3. The errors committed by the Fifth Circuit are susceptible to Rule 60(b) relief.

As illustrated above, relief under Rule 60(b)(6) has been afforded when there has been an error in the application of law or change in law, provided exceptional circumstances are present. This relief is mandated even if the law, as applied by the court at the time of its original ruling, was initially correct and was subsequently changed. In this case, however, the Fifth Circuit's application of the law was erroneous from its inception. Rule 60(b)(6) relief usually arises when the federal court relies upon state law that, although fully viable at the time the federal court renders its opinion, is subsequently overruled. *See, Pierce v. Cook & Co., supra.* In those situations, the federal court may correct its initial ruling. In this case, however, the Fifth Circuit, sitting in diversity, *chose* to ignore state law in effect at the time of its decision. As a consequence, Louisiana courts, in an effort to clarify state law, have found it necessary to disagree with the court's rulings in *Lavespere I* and *Lavespere II*.[9]

The error of law committed in this case was incredulous.

a. The Fifth Circuit failed to apply Louisiana law.

At the time of the Fifth Circuit's original ruling in *Lavespere I*, several clear state appellate court opinions declared LPLA was *not* retroactive. *Berry v. Commercial Union Insurance Company*, 565 So.2d 487 (La.App. 2d Cir.), *writ denied*, 569 So.2d 959 (1990); *Breeden v. Valencia, Inc.*, 557 So.2d 302 (La.App. 4th Cir. 1990), *writ denied*, 558 So.2d 607 (1990); *Traut v. Uniroyal, Inc.*, 555 So.2d 655 (La.App. 4th Cir. 1989); *McCrossen v. Renovate, Inc.*, 548 So.2d 92 (La.App. 5th Cir. 1989); *Lopez v. Chicago Bridge and Iron Company*, 546 So.2d 291 (La.App. 3d Cir.), *writ*

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[9] Of course, a state court cannot reverse a ruling of the Federal Court of Appeals. Nevertheless, the Louisiana Fourth Circuit Court of Appeal went out of its way to expressly disagree with this court's ruling in *Lavespere II*. *Page v. Gilbert*, 598 So.2d at 1115.

denied, 551 So.2d 1323 (1989); *McCoy v. Otis Elevator Co., Inc.*, 546 So. 2d 229 (La.App. 2d Cir.), *writ denied*, 551 So.2d 636 (1989); *Frederick v. General Motors Corporation*, 544 So.2d 757 (La.App. 3d Cir. 1989). In contrast, *absolutely no state court* pronouncement supported the Fifth Circuit's ruling.

In his petition for rehearing, petitioner pointed out the absolute dearth of state law supporting the Fifth Circuit's original decision. In response, the Fifth Circuit, on rehearing in *Lavespere II*, boldly stated:

> [N]one of the rulings in the Louisiana intermediate appellate court opinions dictates a result contrary to the conclusion we have reached. In none of the Louisiana cases was burden of proof involved. In none of these did the appellate court determine whether the burden of proof provisions, being procedural, as distinguished from the substantive provisions of law, applies to pending cases. In none did the court consider the applicability of the principles of statutory construction set forth in the Civil Code. *Lavespere II*, 920 F.2d at 260-61.

At the heart of the Fifth Circuit's original ruling, that the burden of proof provisions of LPLA apply retroactively, is the contention that LPLA is susceptible to a clear division of substantive and procedural provisions; that the substantive provisions apply prospectively; and, that the procedural provisions apply retroactively. *Id.* The court used this substantive/procedural dichotomy to distinguish *all* contrary Louisiana jurisprudence at the time of its decision in *Lavespere II*.

Contrary to the Fifth Circuit's contentions, however, the court in *Frederick v. General Motors Corp.* specifically and unequivocally stated that *LPLA* (without qualification) had "no bearing on this case" because the accident, just as in the case at issue, arose prior to effective date of LPLA. 544 So.2d at 761, n.1. The Fifth Circuit failed to mention, moreover, that *Frederick* involved the plaintiff's failure to meet his *burden of proof* in showing unreasonably dangerous in normal use. *Id.* at 762. Significantly, the *Frederick* court did not mention

any substantive/procedural dichotomy. Rather, the *Frederick* court refused application of LPLA *in toto*.

In addition, the court in *McCoy* did not make a substantive/procedural distinction in determining whether LPLA was retroactive. Instead, the court specifically held that "[t]he *act* [without qualification] is substantive legislation which defines plaintiff's cause of action and should be applied *prospectively only*." *McCoy*, 546 So.2d at 232 (Emphasis added). In distinguishing *McCoy* the Fifth Circuit, in *Lavespere I*, stated:

> The *McCoy* court was called on to consider whether the act retroactively eliminated the cause of action for products that are unreasonably dangerous per se. Thus, the only question before the court was a narrow one: whether the 'exclusivity of remedies' clause found in Louisiana Revised Statute 9:2800.54, which had the effect of eliminating that cause of action, should be retroactively applied. The court was not required to consider, as we are here, the quite different question whether other provisions of the act that are merely procedural should be given retrospective effect. To the extent that the court's remarks concerning the retroactive effect of the Act may be construed to apply to this question, those remarks are dicta. *Lavespere I*, 910 F.2d at 182-83.

As authority for its substantive/procedural dichotomy distinguishment of *McCoy*, the Fifth Circuit cited *Tullier v. Tullier*, 464 So.2d 278, 282-283 (La. 1985) and *Hebert v. Weaver*, 484 So.2d 743, 745-476 (La.App. 1st Cir.), *writ denied*, 487 So.2d 440 (1986), for the proposition that Louisiana courts have on occasion accorded different provisions of a legislative act varying temporal effects. *Lavespere I*, 910 F.2d at 183, n. 83. *Tullier* and *Hebert* do not, however, support the Fifth Circuit's dissection of LPLA and application of certain provisions retroactively and others prospectively, especially in the face of *direct authority to the contrary*. *Tullier* held that La. Civil Code Article 2340 was to be afforded retroactive force. *Hebert* held that La. Civil Code

Articles 2345 and 2357 apply prospectively only. Articles 2340, 2345 and 2357 were enacted by the same legislative act, Act 709 of the 1979 Regular Legislative Session. Act 709 enacted an *entirely new* Title to Book III of the Louisiana Civil Code, adding *sixty* new articles. These additional articles were part of a massive revision of the Louisiana Civil Code, ranging from the definition of a matrimonial regime, art. 2325, to the periodic allowance of marital portion, art. 2437. Each of these articles must, of course, be afforded different application; to suggest otherwise would be preposterous. In contrast, Act 64 of 1988 (LPLA) added only *one* section, with eight subsections to Title 9 of the Louisiana Revised Statutes. *All* case law interpreting this one section, along with the *clear legislative history*, unequivocally mandated that the act, *in toto*, was to be afforded prospective application only.[10] Consequently, the Fifth Circuit's rulings in *Lavespere I* and *Lavespere II*, and the denial of petitioner's Motion for Reconsideration are clearly erroneous.

Additional jurisprudence, in effect at the time of the Fifth Circuit's opinions in *Lavespere I* and *Lavespere II*, clearly shows that the retroactive application of LPLA was wrong. In *Lopez v. Chicago Bridge and Iron Company*, 546 So.2d 291

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[10] At the time of the passage of LPLA, both houses of the legislature passed the following amendment to LPLA in the Second Extraordinary Session of the 1988 Legislature:

> The provisions of Act No. 64 of the 1988 Regular Session are hereby deemed to establish the limitations of liability of manufacturers for damage caused by their products and the right of a claimant to recover from the manufacturer for damage caused by the product, and *all of the provisions are deemed to be substantive in nature and shall have prospective application only and shall apply to all claims brought on or after September 1, 1988.*

Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 La.L.Rev. 565, 625-626, n. 248 (1984) *supra*, note 248, at 625-626. *See also*, Galligan, *The Louisiana Products Liability Act: Making Sense Of It All*, 49 La.L.Rev. 629, 687 (1989).

This amendment was vetoed by the governor because it was beyond his call for the special session and was considered unconstitutional. Nevertheless, the vetoed Act establishes that both branches of the legislature intended LPLA to be substantive in nature, and intended that it have only prospective application.

(La.App. 3rd Cir. 1989), the court held that § 9:2800.53(1) and (1)(a), which incidently are clearly procedural,[11] did not apply retroactively. The Fifth Circuit dismissed *Lopez* because it "did not even refer to the burden of proof section of the Act." *Lavespere II*, 920 F.2d at 261.

In *McCrossen v. Renovate, Inc.*, 548 So.2d 92 (La.App. 4th Cir. 1989) the court broadly stated that "9:800.51 *et seq.* [without qualification]" is not to be afforded retroactive application. *Id.* at 94. In *Traut v. Uniroyal, Inc.*, 555 So.2d 655, 656, n.1 (La.App. 4th Cir. 1989), and *Breeden v. Valencia*, 557 So.2d 302, 308, n.5, the courts supported the conclusion that LPLA, *in toto*, was not to be given retroactive application. Once again, however, the Fifth Circuit, disregarded these cases because the burden of proof provisions were not directly addressed, despite the fact that they clearly stated that LPLA, as a whole and without qualification, was intended to be prospective only.

In *Berry v. Commercial Union Insurance Co.*, 565 So.2d 487, 490 (La.App. 2d Cir. 1990), the court, just as all others before it, unequivocally held that LPLA, without qualification, "affects substantive rights and is therefore *prospective only*." *Id.* at 490 (emphasis added). The court in *Berry*, just as all other past jurisprudence, did not choose to narrow its holding to a "specific provision" of the Act. Nevertheless, the Fifth Circuit sitting in diversity and obligated to apply Louisiana law, in *Lavespere I*, *Lavespere II* and apparently in denying petitioner's motion for reconsideration, felt compelled to do so.

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[11] Sections 9:2800.53(1) and (1)(a) provide the definition of "manufacturer". These provisions are clearly interpretive because they do nothing more than interpret or memorialize the already existing definition of manufacturer. *See* 1 M. Planoil, *Civil Law Treatise*, Nos. 249-252 (La. St.L. Inst. Trans. 1959); A. Yiannopoulous, *Civil Law Systems*, 68 (1977).

b. Subsequent Louisiana law has expressly disagreed with the Fifth Circuit.

Approximately six months after the Fifth Circuit's ruling in *Lavespere II*, the Louisiana Supreme Court addressed the issue of the retroactivity of LPLA in *Gilboy v. American Tobacco Co.*, 582 So.2d 1263 (La. 1991). In *Gilboy*, the court held "the Act [without qualification] alters substantive rights, it is not retroactive and does not apply to this lawsuit . . . [a] statute that changes settled law relating to substantive rights only has prospective effect." *Id.* at 1264-1265 (emphasis added) (citations omitted). Although this pronouncement seems clear because, like all earlier jurisprudence, the court discussed the "Act" *in toto*, given the Fifth Circuit's opinion in *Lavespere II*, petitioner decided to delay his filing for Rule 60(b)(6) relief until a clearer pronouncement was rendered.

The clear pronouncement came on March 31, 1992, when the Fourth Circuit Court of Appeal of Louisiana held that the burden of proof provisions in LPLA were to be afforded prospective effect *only* in *Page v. Gilbert*, 598 So.2d 1110 (La.App. 4th Cir.), *writ denied*, 605 So.2d 1146 (1992). In so doing, the court in *Page* expressly disagreed with the Fifth Circuit's ruling in *Lavespere II*, explicitly criticizing the *Lavespere* court's erroneous application of Louisiana law. *Id.* at 1115.

Given the *Page* court's pronouncement, the fact that the Fifth Circuit erroneously interpreted Louisiana law in its original and rehearing opinion is irrefutable. As a result, James R. Lavespere is entitled to have the judgment of the Fifth Circuit vacated.

C. This case has numerous extraordinary circumstances warranting relief under Rule 60(b).

1. Petitioner has never received his day in court.

In applying Rule 60(b)(6), there is much more reason for liberality in reopening a judgment when the merits of the case never have been considered than when the judgment comes

after a full trial on the merits.[12] In the first leading case to discuss the limits of judicial discretion under Rule 60(b)(6), the United States Supreme Court placed a great deal of emphasis on a party's entitlement to trial. *Klapport v. United States*, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 1099 (1949). In *Klapport* the court applied Rule 60(b)(6) to vacate a judgment entered more than four years before petitioner sought relief. One of the factors entitling the petitioner to relief was the fact that he had never been afforded a trial. In the words of Justice Black, writing for the Court:

> [P]etitioner is entitled to a fair trial. He has not had it . . . Fair hearings are in accord with fundamental concepts of justice, and the language of the "other reason" clause of 60(b) is broad enough to authorize the court to set aside the default judgment and grant petitioner a fair hearing. *Klapport v. United States*, 335 U.S. at 615.

By virtue of the Fifth Circuit's ruling in *Lavespere*, petitioner has been prevented from having his day in court. The Fifth Circuit's incorrect application of Louisiana law shifted petitioner's burden of proof in replying to a *pending* motion for summary judgment in a case that had been filed more than three years before and which, under the impression of all parties, was to be governed by pre-LPLA law. Before the Fifth Circuit's ruling in *Lavespere I*, never in the history of this case had any party or the district court claimed or implied that LPLA was applicable. In fact, respondent's motion for summary judgment, which was eventually supplemented and granted, was filed *BEFORE* the effective date of LPLA.

The deposition of plaintiff's expert, Dr. Kenneth Blundell, met the requirements for opposing a summary judgment under pre-LPLA law. The Fifth Circuit expressly found that

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[12] *Spann v. Commissioners of District of Columbia*, 443 F.2d 715, 716 (D.C. Cir. 1970); *Leong v. Railroad Transfer Serv. Inc.*, 302 F.2d 555, 557 (7th Cir. 1962); *Standard Enterprises, Inc. v. Bag-It Inc.*, 115 F.R.D. 38, 39 (S.D. N.Y. 1987); *Bernard v. Missouri Div. of Employment Sec.*, 95 F.R.D. 107, 109 (D.C. Mo. 1982); *Tibbetts v. Wisniewski*, 542 N.E.2d 320, 322 (Mass. App.Ct. 1989).

Dr. Blundell was a qualified expert on the subject of designing safety systems for press brakes,[13] and that his deposition satisfied the requirements of showing that an alternate design was in existence at the time the product left the manufacturer's hands.[14] Significantly, the Fifth Circuit also observed that pre-LPLA law "would have permitted the plaintiff to recover simply by showing that a design modification capable of preventing the accident was theoretically possible."[15] It is irrefutable, therefore, that but for the Fifth Circuit's ruling changing the burden of proof midstream in this case, James R. Lavespere would have had his day in court.

Ironically, in the same opinion in which the Fifth Circuit, without notice to the parties or any authority to do so, changed the burden of proof in this case, the Court observed that "[i]n the summary judgment context, the rules governing burden of proof are *critically* important." *Lavespere I*, 910 F.2d at 178 (emphasis added). Nevertheless, the Fifth Circuit incorrectly applied the law to change the burden of proof, thus depriving petitioner of his day in court *ex post facto*. The Court also denied petitioner's prayer that this case be remanded to afford him a reasonable opportunity to meet the new burden of proof. A burden of proof that he, and everyone else involved in this case, was apprised of for the first time by the Fifth Circuit's ruling.

James Lavespere received serious permanent disability because of respondent's negligence and fault. This tragic loss has been compounded by the deprivation of his day in court, which resulted from the Fifth Circuit's misapplication of Louisiana law.

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[13] *Lavespere I*, 910 F.2d at 177.

[14] *Id.* at 188.

[15] *Id.*

2. Prospective application of the Fifth Circuit's judgment is no longer equitable.

Relief from final judgment can also be afforded under Rule 60(b)(5). Both subsections (5) and (6) can be used to do justice in a particular case. Rule 60(b)(5) provides:

> the court may relieve a party . . . from a final judgment . . . for the following reasons: . . . (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or *it is no longer equitable that the judgment should have prospective application*. 28 U.S.C.A. Rule 60(b)(5) (West, 1992) (emphasis added).

Vacating a judgment because the continued effect of that judgment would no longer be equitable is generally applied in the context of injunctions or other equitable remedies. *Wright & Miller*, § 2863, p. 205. Continued inequitable effect of a judgment is not, however, limited merely to equitable relief. Rather, this form for relief applies to "any judgment that has prospective effect as contrasted with those that offer a present remedy for a past wrong." *Id.*

Virtually every judgment causes some reverberations into the future and has, in that literal sense, some prospective effect. In fact, even a money judgment has continuing consequences, most obviously until it is satisfied and thereafter as well since everyone is constrained by his net worth. The fact that a judgment has continuing consequences, however, does not necessarily mean that it has "prospective application" for the purpose of Rule 60(b)(5). Although the rule itself and the accompanying notes of the Advisory Committee fail to define the exact meaning of "prospective application," the Fifth Circuit has ruled that a dismissal has "prospective application."

In *Kirksey v. City of Jackson*, 714 F.2d 42 (5th Cir. 1983), the court stated:

> If a dismissal would bar a new and independent action between the same parties based on the same claims, reasserted on the basis of the alleged

> changes in controlling law, and thus denies the plaintiffs the right to retry their claims in light of the changes in the statutory and decisional law applicable to their action, then it would have prospective application by virtue of the continuing effect of the bar. *Id.* at 43.

Under the *Kirksey* definition, the Fifth Circuit judgment in *Lavespere* is clearly one that has "prospective application." Petitioner is no longer entitled to bring a new action against respondent for the recovery of his injuries.

In this case, no one will be unduly prejudiced by an order vacating the original judgment. There has been no grant of a money judgment which now must be undone. No party to this action will have to return or give up anything. At worst, if the judgment is vacated, respondent will be forced to defend a case which was wrongfully dismissed on summary judgment in the first place.

"Generally courts have refused to undo the past, executed effects of the judgments, but they have *almost uniformly* recognized that it would be unjust to give prospective effect to a judgment now known to be improper." *Ritter v. Smith*, 811 F.2d 1398, 1402 (11th Cir. 1987) (emphasis added) (citations omitted). The fact that a judgment is unexecuted, moreover, "is a significant factor in the extraordinary circumstances favoring relief from the judgment." *Id.*

This Honorable Court must choose between petitioner's right to have his day in court versus respondent's right to continue to take advantage of an erroneous judgment to defeat the litigation of this claim. In light of the mandate under Rule 60(b)(5) and (b)(6) to accomplish substantial justice and fairness, the choice is clear: James Lavespere is entitled to have his day in court.

3. The Fifth Circuit has left petitioner no alternative but to seek 60(b) relief.

In his petition for rehearing from the Fifth Circuit's ruling in *Lavespere I*, petitioner stated:

> Failure of the appellate panel to reverse retroactive application of LPLA to this case, or to certify this

> issue to the Louisiana Supreme Court for definitive resolution, will probably deny finality to this dispute between the parties. Given the full consideration of the issue of retroactivity by the appellate courts in *Berry*, and *McCoy*, it is unlikely that the Louisiana Court of Appeal, Second Circuit, and Fourth Circuit will follow this Honorable Court's interpretation of LPLA over their own. Should those courts, or any other Louisiana appellate panel, or Louisiana Supreme Court, subsequently reject the panel's opinion on original holding in this case, plaintiff will then have valid grounds to apply for relief from the panel's judgment of August 13, 1990 under F.R.C.P. 60(b)(6).

Just as petitioner predicted, Louisiana state courts have now explicitly rejected the Fifth Circuit's ruling in *Lavespere*, entitling petitioner to relief from that judgment under Rule 60(b).

There are several actions the Fifth Circuit could have, and should have, done to preserve petitioner's claim. First, the court could have remanded the case to the district court for further proceedings on respondent's motion in light of the newly imposed burden of proof, thereby giving petitioner an opportunity to oppose the motion under LPLA. It failed to do so. Second, the Court could have certified the issue to the Supreme Court of Louisiana. It failed to do so. Third, the Court could have properly applied Louisiana law in effect at the time of its decision. The Court declined to take any of these actions, despite Lavespere's entreaties.

In short, the Fifth Circuit has left petitioner no other alternative but to file this Application for Certiorari. This extraordinary request is the direct result of the Fifth Circuit's extraordinary rulings.

4. The Fifth Circuit's ruling has been expressly disagreed with by state jurisprudence.

Another factor which courts consider as supporting a finding of extraordinary circumstance is the similarity between the original court pronouncement and the eventual

case which changes the law or points out the error in the original decision.[16] In this case there is no need for an inquiry into the similarity of the two cases at odds because the second case, *Page v. Gilbert*, expressly and unequivocally recognizes the Fifth Circuit's error of law in *Lavespere*.

D. Petitioner was deprived of his property right without Due Process of Law

1. Petitioner's cause of action is entitled to due process protection.

"Where an injury has occurred for which the injured party has a cause of action, such cause of action is a *vested property right* which is protected by the guarantee of due process." *Burmaster v. Gravity Drainage Dist. No. 2*, 366 So.2d 1381 (La. 1978) (emphasis added).

The Supreme Court has long recognized, and it is now firmly entwined in the fabric of our law, that property interests protected by due process extend well beyond actual ownership of real estate, chattels, or money. *Connell v. Higginbotham*, 403 U.S. 207, 208, 91 S.Ct. 1772, 1773, 29 L.Ed.2d 418 (1971); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). "Property" is a broad and majestic term, and is among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience." "Property" relates "to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646, 69 S.Ct. 1173, 1195, 93 L.Ed. 1556 (1949) (Frankfurter, J. dissenting). "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not

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[16] *Ritter v. Smith*, 811 F.2d 1398, 1402 (11th Cir. 1987); *Pierce v. Cook & Co.*, 578 F.2d 720 (10th Cir. 1975), *cert. denied*, 423 U.S. 1079, 96 S.Ct. 866, 47 L.Ed.2d 89 (1976); *Watson v. Symons Corp.*, 121 F.R.D. 351 (N.D. Ill. 1988); *Tsakonites v. Transpacific Carriers Corp.*, 322 F.Supp. 722 (S.D. N.Y. 1970).

be arbitrarily undermined." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

"Property interests, of course, are not created by constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Louisiana law provides that a cause of action for injuries is a "vested property right which is protected by the guarantee of due process." *Lott v. Haley*, 370 So.2d 521, 524 (La. 1979); *Burmaster*, 366 So.2d at 1387; *Johnson v. Fournet*, 387 So.2d 1336, 1339 (La.App. 1st Cir. 1980). *See also, Gibbes v. Zimmerman*, 290 U.S. 326, 332, 54 S.Ct. 140, 142, 78 L.Ed. 342 (1933) ("a vested cause of action is property and is protected from arbitrary interference" and its owner "is guaranteed by the Fourteenth Amendment the preservation of his substantial right to redress by some effective procedure."); *Pritchard v. Norton*, 106 U.S. 124, 132, 1 S.Ct. 102, 108, 27 L.Ed. 104 (1882) ("a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference.").

Pursuant to these authorities, James R. Lavespere's right of action against Niagra Machine & Tool Works for defective design of the press brake and for damages resulting from the amputation of his fingers is "property" under the Louisiana and United States Constitutions. Furthermore, Mr. Lavespere's property right, just as any other tangible property, is protected against arbitrary interference and unlawful taking.

2. The necessity of process.

"[C]onsiderations of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant*

Workers Union v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748-1749, 6 L.Ed.2d 1230 (1961); *see also*, *Hannah v. Larche*, 363 U.S. 420, 440, 442, 80 S.Ct. 1502, 1513, 1514, 4 L.Ed.2d 1307 (1960). The fundamental requisites of due process of law are timely notice and the opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Goldberg v. Kelly*, 397 U.S. at 267, 90 S.Ct. at 1020; *Armstrong v. Munzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 69 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914); *Wilson v. City of New Orleans*, 479 So.2d 891 (La. 1985). Under Louisiana law, it is well established that "procedural and remedial laws are not accorded retroactive effect where such retroactivity would operate unconstitutionally to disturb vested rights." *Lott v. Haley*, 370 So.2d 521 (La. 1979).

In response to these constitutional mandates, the Fifth Circuit commented, "[i]t is well settled in Louisiana that laws affecting burden of proof are 'procedural' as that term is used in Civil Code article 6." *Lavespere I*, 910 F.2d at 182, *citing*, *Ardoin v. Hartford Accident & Indem. Co.*, 360 So.2d 1331, 1339 (La. 1978) and *Succession of Sanders*, 485 So.2d 126, 131 (La. App. 2d Cir.), *writ denied*, 487 So.2d 443 (1986). What the Fifth Circuit failed to recognize, however, is that, despite the fact that as a general rule burden of proof provisions are retroactive, retroactive application of changes in burden of proof statutes *may not* be made when such an application would "operate unconstitutionally to disturb vested rights." *Lott v. Haley*, 370 So.2d at 523-524. This rule is clear.

In addressing the unconstitutional deprivation of petitioner's right of action, the Fifth Circuit noted that "[w]e discern no such problems here." *Lavespere I*, 910 F.2d at 182. Once again, however, the Court failed to recognize that retroactive application of the burden of proof provision in this case was unconstitutional. It is one thing to apply a subsequent change in the law regarding burden of proof to a matter that arose before its passage and had not been tried, as was the case in *Ardoin* and *Succession of Sanders*. It is quite another matter, however, to retroactively defeat a claim that had

already been briefed, argued and finally disposed of under a different burden of proof, without affording the owner of the cause of action any notice or opportunity to respond. The latter instance, which illustrates the Fifth Circuit's ruling in *Lavespere*, is an unconstitutional deprivation of a protected property interest. E.g., *Lott v. Haley*, 370 So.2d 521 (La. 1979).

The rule mandating necessity of process before the deprivation of a constitutionally protected property interest is painfully clear: Procedural and remedial laws cannot, consistent with state and federal constitutions, apply retroactively to disturb a person of a pre-existing right. *Lott v. Haley*, 370 So.2d at 524; *Orleans Parish School Board v. Pittman Construction Co.*, 261 La. 665, 20 So.2d 661 (1972); *Succession of Lambert*, 210 La. 636, 28 So.2d 1 (1946); *Shreveport Long Leaf Lumber Co. v. Wilson*, 195 La. 814, 197 So. 566 (1940).

Due process is not a technical concept with a fixed content unrelated to time, place, and circumstance. *Cafeteria Workers, supra.* Due process requires at least rudimentary precaution against unfair and arbitrary deprivation of one's property. The Fifth and Fourteenth Amendments protect the citizen against the Federal government, the State and all of their creatures. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

3. James Lavespere's property interest and entitlement to due process.

On August 20, 1985, James Lavespere's fingers were amputated in a tragic accident. He filed suit for recovery of his damages incurred as a result of this accident. It is uncontroverted and unequivocal that his right of action is a property interest entitled to constitutional protection. In the next two and one-half years, Mr. Lavespere prepared for his pending trial. Respondent, Niagra Machine & Tool Works, Inc., filed its first motion for summary judgment two full months before the effective date of LPLA. The deposition of Dr. Kenneth Blundell which the Fifth Circuit found did not comply with

LPLA, was taken on June 29, 1987, more than a year before the effective date of LPLA. Before the Fifth Circuit's ruling, never in the history of this case had any party or the lower court claimed or even suggested the applicability of LPLA to this case. By the time the Fifth Circuit rendered its subject ruling, numerous pronouncements by Louisiana state courts declared that LPLA was not retroactive, *seven* to be exact, with absolutely *no* pronouncement to the contrary. Despite all of the above outlined facts, the Fifth Circuit found that LPLA applied retroactively to defeat petitioner's right of action.

In so doing, the Fifth Circuit noted that its affirmance of the district court judgment rested on reasons not advanced by that court and found that such affirmance was proper, relying on *Church of Scientology of California v. Cazares*, 638 F.2d 1272, 1281 (5th Cir. 1981). *Lavespere II*, 920 F.2d at 262. The court failed to observe, however, that affirmance of a district court's reasons on a different basis is *only proper when* the parties have been given an opportunity to brief and argue the particular basis. *Peskaly v. Seale*, 506 F.2d 1209, 1211, n. 4 (9th Cir. 1974) ("[w]hile the district court did not grant the summary judgment on this ground, we are free to affirm on any ground supported by the record, *provided the parties have had the opportunity to discuss it in their briefs in this Court.*") (emphasis added). *See also, Wells v. Rockefeller*, 728 F.2d 209, 215 (3rd Cir. 1984) (In affirming trial court judgment on another ground, court notes that new ground was actively disputed and briefed below.). Petitioner was denied this opportunity.

After the Fifth Circuit issued its first ruling, and petitioner was first notified of the retroactive application of LPLA, petitioner filed a petition for rehearing asserting that the court's ruling was erroneous under Louisiana law; that the court should at least certify this question before summarily disregarding every state case which discussed the matter; and, that petitioner was entitled to a remand to meet this newly imposed burden of proof. All of petitioner's pleas, however, fell on deaf ears.

E. This Court should vacate the Fifth Circuit's judgment under the principles of Erie.

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1933), the Supreme Court set forth the rule of law for federal courts sitting in diversity. In establishing this rule, Justice Brandeis authored these now famous words:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. *Erie*, 304 U.S. at 78.

Erie and its progeny establish the principle that federal courts must apply state substantive law governing state created rights in diversity cases.[17] The mandate of *Erie* is controlling even when the most recent statement of state law is made during the interim phases of litigation in the federal court. In *Vandenbark v. Owen-Illinois Glass Co.*, 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327 (1941), the Court held that federal courts must recognize the controlling state law which occurred after the district court judgment but while appeal of the case was pending. In so doing, the *Vandenbark* Court held that federal courts are bound, as long as a case is "sub judice," under *Erie* to decide a diversity case according to the latest pronouncement of the highest state court. *Id.* at 543, n.21. In the event the highest state court has not ruled on the question, federal courts are required to apply the most recent interpretation of state law rendered by the intermediate state courts.[18]

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[17] *Hanna v. Plumer*, 380 U.S. 460, 474, 85 S.Ct. 1130, 14 L.Ed.2d 8 (1965) (Harlan, J., concurring).

[18] *Gooding v. Wilson*, 405 U.S. 518, 525, 526 n.3, 92 S.Ct. 1103, 31 L.Ed.327 408 (1972); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78, 61 S.Ct. 176, 85 L.Ed. 109 (1940); *Birmingham Fire Ins. Co. of Pennsylvania v. Winegardner & Hammons, Inc.*, 714 F.2d 548, 550 (5th Cir. 1983) ("when the supreme court of a

Since the court's decision in *Vandenbark*, the parameters of "sub judice" have been extended, and the *Erie* principle, which mandates the incorporation of state law to ensure that federal court litigants have the same result as state court litigants, has been applied where a change in state law occurred between a first appeal and a second appeal after remand of the case for a trial;[19] during the pendency of a petition for a writ of certiorari;[20] after a denial of certiorari but prior to the filing of a timely petition for rehearing;[21] between a first and second petition for rehearing in the court of appeals;[22] and, finally, to a situation where the federal court decision had become final before a change was made in state law.[23]

Since its inception, *Erie* has undergone several changes. Justice Brandeis' powerful mandate was originally interpreted as requiring the application of state law solely to substantive issues, and procedural law was to remain governed by federal law. This eventually led to what has become known as the substance-procedure dichotomy. Eventually, this dichotomy proved susceptible to manipulation and was reformed to provide that the outcome of litigation in federal court must be substantially the same as in state court,[24] commonly referred to as the outcome determination test. The outcome determination test, however, also proved to be fallacious, and was

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state has not spoken to a particular issue, the well-established practice of this circuit is to follow the opinion of the highest court which has written on the matter.")

[19] *Madden v. Metropolitan Life Ins. Co.*, 138 F.2d 708, 708-10 (5th Cir. 1943), *cert. denied*, 322 U.S. 730, 64 S.Ct. 945, 88 L.Ed. 1565 (1944).

[20] *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), *cert. denied*, 400 U.S. 829, 91 S.Ct. 59, 27 L.Ed.2d 5 (1970).

[21] *Conner v. Simler*, 367 U.S. 486, 81 S.Ct. 1679, 6 L.Ed. 2d 1241 (1961) (mem.).

[22] *Huddleston v. Dwyer*, 322 U.S. 232, 235-36, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944) (per curiam).

[23] *Pierce v. Cook & Co.*, 518 F.2d 720, *cert. denied*, 423 U.S. 1079, 96 S.Ct. 866, 47 L.Ed.2d 89 (1976).

[24] *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-109, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945).

revised in light of the twin aims of *Erie*: "discouragement of forum shopping and avoidance of inequitable administration of the laws."[25]

Unlike *Pierce v. Cook & Co., supra* this case does not involve a situation where there was a change in law after the federal court's decision became final. Rather, in this case the law never changed. Louisiana jurisprudence before *Lavespere* provided that LPLA was prospective only, and Louisiana jurisprudence continues to so hold. As a consequence, the *only* case applying LPLA retroactively is the Fifth Circuit in *Lavespere I* and *Lavespere II*. These erroneous interpretations will continue to be "good law" since federal court decisions are not subject to reversal by state courts. Consequently, prospective defendants may fare better by having their diversity cases heard in federal court rather than in state court.

In diversity jurisdiction cases the results in federal court should be substantially the same as those in state court litigation arising out of the same transaction.[26] Here, they were not. When federal courts give parties substantially different treatment than that which would have been received in state court, the principles of *Erie* mandate relief. *Pierce v. Cook & Co.*, 578 F.2d at 723; *First American Nat'l Bank*, 111 F.R.D. at 75.

X. CONCLUSION

Petitioner is entitled to relief under Rule 60(b) vacating the Fifth Circuit's rulings and reversing the district court's summary dismissal of this case. Rule 60(b) allows, and in this

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[25] *Hanna v. Plumer*, 380 U.S. 460, 468, 85 S.Ct. 1130, 14 L.Ed. 2d 8 (1965).

[26] *Pierce v. Cook & Co., Inc.*, 518 F.2d 720, 722 (10th Cir. 1975), *cert. denied*, 423 U.S. 1079, 96 S.Ct. 866, 47 L.Ed.2d 89 (1976); *First American Nat'l Bank v. Bonded Elevator*, 111 F.R.D. 74, 75 (W.D. Ky. 1986). *See also, Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 74-75, 58 S.Ct. 817, 82 L.Ed. 1188; *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 89 L.Ed. 2079; *Hanna v. Plumer*, 380 U.S. 460, 468, 85 S.Ct. 1136, 14 L.Ed.2d 8; *Merchants Transfer & Warehouse Co. v. Ragan*, 170 F.2d 987, 991 (10th Cir. 1948), *aff'd*, 337 U.S. 580, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949).

case mandates, such relief. Petitioner never had an opportunity to try to meet the new burden of proof retroactively and erroneously imposed upon him by the Fifth Circuit. Consequently, petitioner has been unconstitutionally deprived of his property right without due process of law. Petitioner respectfully submits, therefore, that he is entitled to relief from this Honorable Court. Petitioner respectfully prays that this Court stay the consideration of this matter pending ruling from the Fifth Circuit on his Motion for Reconsideration, and, in the event the Fifth Circuit denies petitioner's motion, prays that this court grant certiorari in this matter.

Respectfully submitted,

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(318) 445-6471

Attorneys for Petitioner,
James R. Lavespere

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JAMES R. LAVESPERE	:	CIVIL ACTION NO.
-vs-	:	86-1833
	:	(JUDGE SCOTT)
NIAGARA MACHINE & TOOL WORKS, INC.	:	(Filed Nov. 1, 1988)

RULING

Before us is defendant Niagara Machine & Tool Works, Inc.'s Motion for Summary Judgment.

The issue presented by defendant Niagara's motion is "whether the failure of plaintiff's employer to prevent harm to plaintiff was a superseding cause" of plaintiff's injuries, thereby relieving Niagara of liability. Niagara's Memorandum at p. 6.

Having considered the memoranda, affidavits and depositions filed in this matter, we find genuine issues of material fact which preclude "judgment as a matter of law" on the issue presented. Fed. R. Civ. P. 56(c). *Cf. Gordon v. Niagara Machine & Tool Works, Inc.*, 574 F.2d 1182 (5th Cir. 1978). On the facts now before us, we simply cannot say that the positions urged upon us by the parties, and as analyzed by the *Gordon* court, do not present genuine issues of law and fact for trial.

Motion for Summary Judgment is DENIED.

DONE AND SIGNED as Alexandria, Louisiana, this 1st day of November, 1988.

UNITED STATES
DISTRICT JUDGE

COPY SENT
DATE 11-1-88
BY PA
TO: Bruser
Mansour
Smith

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JAMES R. LAVESPERE	:	CIVIL ACTION
-vs-	:	No. 86-1833
	:	(JUDGE SCOTT)
NIAGARA MACHINE & TOOL WORKS, INC.	:	(Filed Feb. 15, 1989)

RULING

Before us is defendant Niagara Machine & Tool Works, Inc.'s Motion for Summary Judgment.

Plaintiff seeks to recover damages for injuries sustained while operating a press brake manufactured by defendant Niagara and owned by plaintiff's employer Baker Manufacturing Company.

Niagara now contends that its press brake is not defective as a matter of law, citing a recent Louisiana case, *Sawyer v. Niagara Machine & Tool Works, Inc.*, No. 84-2597 (La.App. 2d Cir. Oct. 26, 1988), *writ. denied*, No. 88-2765 (La. Jan. 13, 1989).

We agree and grant Niagara's motion.

At the time of his accident, plaintiff was executing a bend in pieces of metal, apparently to form component parts for metal lockers made by his employer. In order to remove a piece of metal that had become stuck, plaintiff inserted his hands between the metal dies affixed to the machine. The press brake actuated when plaintiff

depressed the foot pedal, compressing the dies and crushing/amputating his fingers.

Niagara sold the instant press brake in May, 1966, to the MacKenzie Machinery Company in Auburn, Massachusetts. The precise chain of ownership from 1966 until 1978, when Baker acquired the machine, apparently is not known.[1]

The press brake here is a general purpose type and is subject to use in any ("infinite") number of manufacturing system configurations. In fact, until metal dies are fitted onto the machine, the press brake has no ascertainable 'point of operation.'[2] It is at the 'point of operation' where raw material/metal is bent or cut, and where injury to the operator is possible.

When originally sold in 1966, Niagara provided no dies with the machine. Thus, when originally sold, Niagara could not anticipate any specific manufacturing system of which its press brake would be one component. With no defined point of operation to safeguard, Niagara necessarily sold its machine without a point of operation guard or protection device.

In fact, in 1966 (and apparently to date), Niagara normally manufactured and merchandized its general

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[1] We dismissed Rex Supply Corporation and Rex Machinery Sales, Inc. as the alleged supplier of the press brake to Baker. Plaintiff did not oppose Rex's dismissal.

[2] "The'point of operation' is generally the area between the dies where raw material is bent or cut when the dies are mechanically brought together by the drive mechanism of the machine." Affidavit of H. Stanton Cheyney.

purpose press brakes without safety guards or protection devices. Such practice accords with the custom in the power press industry. According to standards set by the American National Standards Institute, press brake manufacturers place responsibility for operator protection on the actual employer or owner of the machine. Indeed, it is the employer/owner who determines the system configuration in which the press brake will operate, by installing the metal dies and establishing a point of operation.

Thus, Niagara relied on the owner of its machine to provide protection for the operator. In 1982, Niagara sent its safety manual to plaintiff's employer Baker Manufacturing. This manual explained that it was the "responsibility of the employer-management" to provide protective devices for operators. No protective device was being utilized at the time of plaintiff's injury.

Industry custom, although not conclusive, may be considered when determining the duties owned by a manufacturer for its product. *Leonard v. Albany Machine & Supply Co.*, 339 So.2d 458, 463 (La.App. 1st Cir. 1976), *writ denied*, 341 So.2d 419 (La. 1977). *See also, Winterrowd v. Travelers Indemnity Co.*, 452 So.2d 269 (La.App. 2d Cir. 1984), *Aff'd.* 462 So.2d 639 (La. 1985) (citing the ANSI standards).

The custom here was not set arbitrarily. Niagara's general purpose press satisfies a market demand, a compelling need of industry. On the date of manufacture Niagara did not, could not, know to which of many uses its general purpose press brake would be put from May 1966 until the time of plaintiff's accident. Simply put, how could Niagara provide a protective device suitable

for every conceivable manufacturing system configuration? Beyond exhortation and allegation, plaintiff has produced no evidence to explain how Niagara could have produced such a 'universal' guard when it sold the machine in 1966. *See Gordon v. Niagara Machine & Tool Works*, 574 F.2d 1182, 1190 (5th Cir. 1978).

Instead, plaintiff contends that Louisiana law imposes upon a manufacturer the absolute and non-delegable duty to provide its machines with adequate guards or to make its machines inoperable without adequate guards. As the *Sawyer* Court makes clear, that is not the law of Louisiana where, as here, the machine is not sold as a completed unit or system.[3]

Accordingly, we hold that, on the evidence before us, Niagara's press brake as manufactured and sold was not defective as a matter of law.

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[3] Plaintiff also refers to our Conclusion of Law in *Robertson v. Superior PMI, Inc.*, 600 F. Supp. 790, 795 (W.D. La. 1985), quoted by the Fifth Circuit on appeal at 791 F.2d 402, 407 (5th Cir. 1986):

> . . . a manufacturer of dangerous machinery has a duty to protect a worker stationed near that machinery, where it is reasonably foreseeable that the worker would be placed near the machinery and where it is reasonably foreseeable that the worker would suffer injury from that machinery's operation.

However, although in *Robertson* the manufacturer did not supply the entire "layup line" to plaintiff's employer, the manufacturer did supply not only the saw but also the control panel. Furthermore, the manufacturer actually assisted "in the wiring and start-up of the flying saw." *Robertson*, 600 F. Supp. at 792. It is uncontroverted here that Niagara did not provide or choose the metal dies, or participate in setting up the system configuration.

Accordingly, Niagara's Motion for Summary Judgment is GRANTED.

DONE AND SIGNED at Alexandria, Louisiana, this 15th day of February, 1989.

COPY SENT

DATE 2-15-89

/s/ Nauman S Scott
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JAMES R. LAVESPERE

VS. CIVIL ACTION NO. 86-1833-A

NIAGARA MACHINE & TOOL WORKS, INC. AND REX SUPPLY CORPORATION

JUDGMENT

(Filed Feb. 28, 1989)

This matter having come on for hearing on the First Supplemental Motion For Summary Judgment of defendant, Niagara Machine & Tool Works, Inc., and the Motion For Reconsideration of the ruling of the court on defendant's First Supplemental Motion For Summary Judgment, and the court, having allowed the filing into evidence of the deposition of Dr. Kenneth Blundell in support of plaintiff's opposition to said First Supplemental Motion For Summary Judgment, and considering the law and evidence, and considering same to be in favor of defendant, and against plaintiff, declared:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, Niagara Machine & Tool Works, Inc., and against plaintiff, James R. Lavespere, granting defendant's First Supplement Motion For Summary Judgment, and accordingly, there is judgment herein in favor of Niagara Machine & Tool Works, Inc. and against James R. Lavespere dismissing plaintiff's demands against defendant at plaintiff's costs.

SIGNED in Alexandria, Louisiana, on this the 28th day of Feb, 1989.

ATTEST: A TRUE COPY

DATE 3-1 1989
ROBERT H. SHEMWELL, CLERK

Deputy Clerk, U.S. District Court

/s/ Nauman S. Scott
DISTRICT JUDGE

Judgment Entered 3-1-89
By bm
Copy To Bruser, Mansour

James R. Lavespere,
Plaintiff-Appellant
Cross-Appellee,

and

Liberty Mutual Insurance Co.,
Intervenor-Appellant
Cross-Appellee,

v.

NIAGARA MACHINE & TOOL WORKS, INC.,
Defendant-Appellee Cross-Appellant.

No. 89-4208.

United States Court of Appeals,
Fifth Circuit.

Aug. 13, 1990.

Henry B. Bruser, III, Gold, Weems, Bruser, Sharp, Sues & Rundell, Alexandria, La., for Lavespere.

Steven P. Mansour, Michael T. Johnson, Bolen, Erwin, Johnson & Coleman, Alexandria, La., for Liberty Mut. Ins. Co.

Brian D. Smith, Lunn, Irion, Johnson, Salley & Carlisle, Shreveport, La., for Niagara Mach. & Tool Works, Inc.

Appeal from the United States District Court for the Western District of Louisiana.

Before RUBIN, JONES, and BARKSDALE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

An employee of a small manufacturing concern, after sustaining severe injuries to his hands while working with a machine owned by his employer, brought suit against the manufacturer of the machine, alleging that it was defectively designed in that it lacked adequate operator safeguards. After the district court had granted the manufacturer's supplemental motion for summary judgment on the ground that the device in question was not defective as a matter of law, the employee filed a motion for reconsideration and, in support of that motion, proffered evidentiary materials that he had previously failed to submit. The district court admitted and considered those materials, but concluded that they did not warrant setting aside the original judgment. We affirm both the court's decision to consider the materials and its ruling on the motion for reconsideration.

I

Niagara Machine & Tool Works has for several decades manufactured a wide variety of hydraulic and electric-powered industrial metal-working machines known as "presses." One such device, the general-purpose "press brake," can be used to bend or to cut metal parts. It presses the metal part between two "dies" (hard metal teeth), one located on a stationary base, the other on a heavy metal "ram" that, when activated by a hand or foot control, descends toward the base. Though the base and the ram of the press brake have slots into which dies can be inserted, the dies are not a part of the press brake itself. The operator of the press brake must select dies

that are appropriate for the particular bending or cutting operation to be performed. As manufactured, the press brake also lacks "point of operation" safeguards, that is, some mechanism or device that will either prevent the ram from becoming activated while the operator's hands are between the dies or exclude the operator's hands from that space while the ram is in motion. Niagara, however, manufactures several such safeguards and offers them for sale to its press brake customers.

In 1978 Baker Manufacturing Company, a small manufacturing concern whose facilities are located in Louisiana, purchased from Rex Supply Company a used general-purpose, foot-activated press brake that had been manufactured by Niagara about 1966. Some years later, Baker purchased a point-of-operation safeguard for the press brake known as a "light screen". This device, which is equipped with an electric eye, detects the presence of the operator's hands when they are in the point of operation. Although Baker installed the device on the press brake, Baker did not make it operational.

In the spring of 1985, James Lavespere, a recent high school graduate, went to work for Baker in its metal shop. After he had been on the job a few weeks, his superiors assigned him the task of "knifing" (bending) "verticals," six-foot long pieces of metal used in the construction of lockers. For this purpose, Lavespere employed the Niagara press brake. Lavespere, like the other operators of the machine, found that verticals would sometimes stick to the upper die after having been knifed. Although his supervisors and co-workers had advised him to free the verticals using a rubber mallet, Lavespere found it easier to tear them loose with his hands, a procedure that

required him to insert his hands into the point of operation.

Only a few days after he had begun to perform the knifing operation on his own, Lavespere attempted to free a stuck vertical with his hands. As he did so, the ram unexpectedly became activated and descended, pressing his fingers between the vertical and the lower die and causing severe injuries to his hands, including the loss of several fingers. Although none of the parties has established the cause of the ram's activation, they suggest two possibilities: the press brake went through a "double stroke" or Lavespere inadvertently stepped on the foot pedal.

One year later Lavespere filed suit in federal court against Niagara Machine & Tool Works, as manufacturer, and Rex Supply Company, as vendor, of the press brake, contending that the press brake, insofar as it lacked a point-of-operation safeguard, was defectively designed. Baker's workers' compensation insurer, Liberty Mutual Insurance Company, intervened, seeking to recover workers' compensation benefits that it had paid to Lavespere. The district court subsequently dismissed Rex Supply.

Niagara filed a motion for summary judgment, contending that Niagara owed no duty to Lavespere to guard the press brake and that Baker's failure to guard the press brake was a superseding cause of the accident. It accompanied the motion with several attachments, including an affidavit by Stanton Cheyney, an engineer and an officer of Niagara. In the affidavit, Cheyney alleged that it is not

possible to design a "universal" point-of-operation safeguard, that is, one single safeguard capable of protecting all operators of the machine in all of its possible applications. According the Cheyney, which safeguard is appropriate and effective varies with the particular bending or cutting operation to be performed. For these reasons, Cheyney explained, it is the custom of the industry not to install point-of-operation safeguards on the machines, but to leave that responsibility to the purchaser. The district court denied the motion.

Niagara then filed a supplemental motion for summary judgment. Although Niagara relied on the same allegations of fact and the same attachments as before, it submitted a new memorandum of authorities based on recent Louisiana jurisprudence, in particular, the decision of the Second Circuit Court of Appeal in *Sawyer v. Niagara Machine & Tool Works, Inc.*[1] Lavespere filed an opposition to the motion without evidentiary attachments, stating that he was content to rely on the attachments he had submitted along with his opposition to Niagara's original motion for summary judgment. This time the district court granted Niagara's motion, ruling that its press brake was not defective as a matter of law.

Shortly thereafter Lavespere filed a motion for reconsideration, seeking to have the ruling overturned. In that motion, Lavespere alleged that: "through inadvertence, mistake and excusable neglect," he had failed to file the

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[1] 535 So.2d 1057 (La.App.1988), *writ denied*, 536 So.2d 1222 (La.1989).

deposition of Dr. Kenneth Blundell along with his opposition to Niagara's supplemental motion for summary judgment, and requested leave to file that deposition for the court's consideration. In that deposition, Blundell testified that in his opinion Niagara could have designed and installed a point-of-operation safeguard that would have been effective at preventing injuries in a considerable percentage of the possible applications of the machine, perhaps as much as eighty-five percent, and, further, that the technology necessary for designing and installing such a point-of-operation guard had been available for Niagara for many years prior to 1966. Although the district court allowed Lavespere to admit the deposition, it nevertheless refused to reverse its earlier judgment; the district court remained persuaded that Niagara was entitled to judgment as a matter of law.

Lavespere and Liberty Mutual appeal from the summary judgment in favor of Niagara, while Niagara appeals from the ruling granting Lavespere's motion for leave to file Blundell's deposition.

II

Niagara's objection to the court's decision to admit and consider Blundell's deposition is two-fold: (i) Lavespere did not timely submit the deposition; and (ii) Blundell was not qualified to testify as an expert on the subject of designing point-of-operation safeguards.

A.

Niagara alleges, and Lavespere does not deny, that Blundell's deposition was available to Lavespere two years before Niagara filed its supplemental motion for summary judgment and that Lavespere could have submitted it as an attachment to his opposition to that motion. Because Lavespere failed to do so, Niagara argues, he may not be permitted to file the transcript belatedly unless he can provide an adequate excuse for his default. According to Niagara, Lavespere has not done so.

That Lavespere should have filed Blundell's deposition before the rendition of summary judgment is not disputed. In case after case, the federal courts have declared that if an opponent of a motion for summary judgment wishes the district court to consider certain evidentiary materials in ruling on the motion, then she "must" submit those materials along with her opposition to the motion, or at least before the ruling on the motion.[2] The question presented here is what corrective steps, if any, the nonmoving party may take in the event she fails to comply with that rule and, in particular, under what circumstances she may submit the materials for the court's consideration in connection with a motion for reconsideration of the summary judgment.

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[2] *See generally Couch v. Travelers Ins. Co.*, 551 F.2d 958, 959-60 (5th Cir.1977); *see also Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985); *Mas Marques v. Digital Equip. Corp.*, 637 F.2d 24, 29-30 (1st Cir.1980).

Unfortunately, the federal courts so far have not provided a uniform answer to this question. In some decisions on this subject one finds statements that, at least on first reading, seem to suggest that a district court has no discretion to admit and consider such belatedly-submitted evidentiary materials unless the evidence they contain is "newly-discovered."[3] Others suggest that the materials need not set forth newly-discovered evidence, provided that the defaulting party can show her failure to submit the document on time was the result of "excusable neglect."[4] Still others, which reflect an even more indulgent approach, contain statements suggesting that the district court has discretion to admit and consider a document that does not set forth newly-discovered evidence, at least so long as the defaulting party provides some plausible explanation for the default,[5] or the document contains critical evidence and admitting it will not result in undue prejudice to the other party.[6]

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[3] *See Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656, 665-66 (N.D.Ill.1982), *aff'd*, 735 F.2d 1367 (7th Cir.1984); *Vartan v. Harristown Dev. Corp.*, 661 F.Supp. 596, 606-07 & n. 4 (M.D.Pa.1987); *see also Harsco Corp.*, 779 F.2d at 909; *DeLong Corp. v. Raymond Int'l, Inc.*, 622 F.2d 1135, 1139-40 (3d Cir.1980).

[4] *See Mas Marques*, 637 F.2d at 29-30; *Couch*, 551 F.2d at 959-60.

[5] *See Hooks v. Hooks*, 771 F.2d 935, 946 (6th Cir.1985); *Anderson v. Montgomery Ward & Co.*, 704 F.Supp. 162, 163 (N.D.Ill.1989); *Michigan State Podiatry Ass'n v. Blue Cross & Blue Shield*, 681 F.Supp. 1239, 1241 (E.D.Mich.1987).

[6] *See Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C.Cir.1980).

We do not pretend to be able to reconcile all of the apparently conflicting statements set forth in these opinions. Nor do we believe it would be particularly instructive to subject each of these decisions to detailed dissection, noting those statements that we endorse and pointing out instances of loose language and slips of the tongue that have, quite unintentionally, produced apparent inconsistency. Under the circumstances, we prefer to start afresh, setting out what we consider to be the governing principles established by the Federal Rules of Civil Procedure.

When a party files a motion for reconsideration of a summary judgment and submits in support of that motion evidentiary materials that she failed to file on time, the extent of the court's discretion to reopen the case and to consider the materials depends, in the first instance, on the particular Federal Rule of Civil Procedure under which the motion arises. The Federal Rules do not recognize a "motion for reconsideration" *in haec verba*. We have consistently stated, however, that a motion so denominated, provided that it challenges the prior judgment on the merits, will be treated as either a motion "to alter or amend" under Rule 59(e) or a motion for "relief from judgment" under Rule 60(b).[7] Under which Rule the motion falls turns on the time at which the motion is served. If the motion is served within ten days of the rendition of judgment, the motion falls under

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[7] *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 288 (5th Cir.1989); *Charles L.M. v. Northeast Indep. School Dist.*, 884 F.2d 869, 869-70 (5th Cir.1989); *Harcon Barge Co. v. D & G Boat Rentals*, 784 F.2d 665, 669-70 (5th Cir.1986) (en banc).

Rule 59(e); if it is served after that time, it falls under Rule 60(b).[8]

To reopen the case under Rule 60(b) on the basis of evidence that was available before rendition of judgment but that was not submitted in a timely fashion, the mover has two options. She can proceed under Rule 60(b)(1), in which case she must show that her default was attributable to "mistake, inadvertence, surprise, or excusable neglect."[9] The motion may instead be brought under Rule 60(b)(6).[10] Although the mover then need not show excusable neglect in order to prevail, the newly-submitted evidence must establish a fact "so central to the litigation that it shows the initial judgment to have been manifestly unjust."[11]

In determining whether the moving party has established "excusable neglect" under Rule 60(b)(1) or manifest injustice under Rule 60(b)(6), the district court enjoys considerable discretion.[12] That discretion, however, is not boundless. In the case of a motion for reconsideration brought under Rule 60(b)(1), for example, if the failure of the party to submit the evidentiary materials in question is attributable solely to the negligence or carelessness of

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[8] *Harcon Barge*, 784 F.2d at 667.

[9] Fed.R.Civ.P. 60(b)(1). *See Mas Marques*, 637 F.2d at 29-30.

[10] Fed.R.Civ.P. 60(b)(6). *See Good Luck Nursing Home*, 636 F.2d at 577.

[11] *See Good Luck Nursing Home*, 636 F.2d at 577.

[12] *United States v. $22,640.00 in United States Currency*, 615 F.2d 356, 360 (5th Cir.1980); *see also Smith v. Alumax Extrusions, Inc.*, 868 F.2d 1469, 1471 (5th Cir.1989).

that party's attorney, then it would be an abuse of discretion for the court to reopen the case and to consider the evidence.[13]

A motion to reopen a case under Rule 59(e), though subject to much more stringent time limitations than a comparable motion under Rule 60(b), is not controlled by the same exacting substantive requirements.[14] Unlike Rule 60(b), Rule 59(e) does not set forth any specific grounds for relief. Nor can we discern any basis for engrafting the strict limitations of the former onto the latter. We conclude, therefore, that in order to reopen a case under Rule 59(e) on the basis of evidentiary materials that were not timely submitted, the mover need not first show that her default was the result of mistake, inadvertence, surprise, or excusable neglect or that the evidence is such as to show that the judgment was manifestly wrong.

Because Rule 59(e) is not subject to the limitations of Rule 60(b), the district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration arising under the former rule. That discretion, of course, is not limitless. In any case in which a party seeks to upset a summary judgment on the basis of evidence she failed to introduce on time, two important judicial imperatives clash: the need to bring litigation to an end and the need to render just decisions

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[13] *Pryor v. United States Postal Serv.*, 769 F.2d 281, 287-89 (5th Cir.1985); *Blinder, Robinson & Co. v. SEC*, 748 F.2d 1415, 1420 (10th Cir.1984).

[14] *See Smith v. Morris & Manning*, 657 F.Supp. 180, 181 (S.D.N.Y.1987).

on the basis of all the facts.[15] The task of the district court in such a case is to strike the proper balance between these competing interests. In order to do this, the court should consider, among other things, the reasons for the moving party's default, the importance of the omitted evidence to the moving party's case, whether the evidence was available to the non-movant before she responded to the summary judgment motion, and the likelihood that the nonmoving party will suffer unfair prejudice if the case is reopened.

For this framework for analyzing and evaluating motions for reconsideration to stand, it must, of course, be consistent with this court's prior decisions. Niagara, citing passages from *Waltman v. International Paper Co.*,[16] maintains that this court is among those that has adopted the "excusable neglect" standard, for Rule (59E) motions that is, the rule that in order to obtain relief from a summary judgment on the basis of evidentiary materials that the moving party failed to submit on time, the party must establish that her failure was due to excusable neglect. We disagree.

In *Waltman* the plaintiff, after the district court had granted the defendant's motion for summary judgment, filed a motion for reconsideration under Rule 59(e). Attached to the motion were several evidentiary documents, all but one of which had been at the plaintiff's disposal at the time she filed her opposition. The district

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[15] *See generally Good Luck Nursing Home*, 636 F.2d at 577-78; *Compton v. Alton S.S. Co.*, 608 F.2d 96, 102 (4th Cir.1979); *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir.1970).

[16] 875 F.2d 468 (5th Cir.1989).

court refused to consider the documents on the ground that their submission was untimely. On appeal, this court affirmed. Quoting a federal district court decision, *Keene Corp. v. International Fidelity Insurance Co.*,[17] the court stated the purpose of Rule 59(e) motions for reconsideration was " 'to correct manifest errors of law or fact or to present newly discovered evidence.' "[18] The court then noted that the plaintiff sought neither to correct errors of law or fact nor to introduce newly discovered evidence through her motion for reconsideration. On the contrary, the court observed, the evidentiary materials submitted along with the motion for reconsideration had been available to the plaintiff at the time she filed her opposition to the defendant's motion for summary judgment. Because the plaintiff did not offer "any explanation" for her failure to submit them at that time, the court concluded, her submission of the materials was "untimely" and, accordingly, the district court had not erred in refusing to consider those materials.[19]

Although the *Waltman* court's remarks arguably are susceptible of the construction that Niagara attempts to put on them, we do not believe that that construction is sound. Our conclusion rests on two considerations. First, in its summary of the plaintiff's conduct, the court faulted her not for failing to show "excusable neglect,"

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[17] 561 F.Supp. 656, 665 (N.D.Ill.1982), *aff'd*, 735 F.2d 1367 (7th Cir.1984).

[18] *Waltman*, 875 F.2d at 473.

[19] *Id.* at 474.

but for failing to provide "any axplanation" for her tardiness.[20] The two expressions are not equivalent, and it may be that the court would have found sufficient an explanation not rising to the level of "excusable neglect." Second, and more important, the court's remarks were made on review of a ruling *denying* a motion to reconsideration. The court's attention, therefore, was focused on finding some justification for the district court's *exclusion* of the late-filed evidence. Because that is so, the court's listing of the defaults of the non-moving party, including her failure to provide a suitable explanation for submitting the affidavits late, does not necessarily establish that the absence of such defaults is a *sine qua non* for *admitting* such evidence and reopening a judgment. On the contrary, those statements indicate only that if a party is guilty of such defaults, then a district court *may*, without committing an abuse of discretion, refuse to admit and consider belatedly-filed evidentiary materials. Therefore, nothing in *Waltman* is inconsistent with the principles we set forth above.

Applying those principles to this case, we begin by determining whether Lavespere's motion for reconsideration arose under Rule 59(e) or Rule 60(b). Lavespere served that motion, which challenged the summary judgment on its merits well before 10 days from the entry of judgment had passed. Characterized according to the rule of *Harcon Barge*, the motion falls under Rule 59(e).

The next step in the inquiry is to determine whether the district court abused its discretion by permitting

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[20] *Id.*

Lavespere to file the deposition along with his motion for reconsideration and in taking that deposition into account in ruling on the motion. Lavespere's failure to file the deposition on time was attributable to his attorney's negligence, not to strategic considerations. Further, Blundell's deposition, which contains Lavespere's only evidence concerning defective design and causation, is of critical importance to Lavespere's case and is highly relevant to the question whether summary judgment should have been granted. Finally, Niagara has not alleged, nor does it appear likely, that Niagara was injured or prejudiced in any way as a result of the district court's reopening the case to consider Blundell's deposition. Lavespere served the motion and his request to file the deposition within eight days of the court's ruling on the motion for summary judgment. Considering these circumstances, we cannot conclude that the district court abused its discretion by reopening the case and admitting and considering Blundell's deposition.

Although we affirm the district court's decision to rescue Lavespere's case from the peril created by his attorney's blunder, it would be a mistake to infer from our decision that attorneys practicing in this circuit may not ignore deadlines for the submission of evidence with impunity. Our decision means only that a district court faced with circumstances analogous to those present here *may* reopen the case; it does not mean that a district court faced with such circumstances *should* or *must* do so.

B

Niagara's second attack on the district court's decision to allow Lavespere to file Blundell's deposition is that Blundell was not qualified to give expert testimony on the subject of designing point-of-operation safeguards. In particular Niagara complains that Blundell had had limited practical experience with press brakes and gained his knowledge of the press brake industry and of press brake safety systems through reading articles listed in a bibliography published by one of Niagara's competitors.

As a general rule, the admissibility of evidence on a motion for summary judgment is subject to the same rules that govern the admissibility of evidence at trial.[21] Thus, before a district court may consider expert opinion evidence set forth in an affidavit or other evidentiary document offered in support of or in opposition to a motion for summary judgment, the court must find, among other things, that that evidence meets the requirements of Federal Rule of Evidence 702, namely, that the person who provided the evidence is "qualified as an expert by knowledge, skill, experience, training, or education."[22] The determination whether the person is so qualified is committed to the discretion of the district

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[21] *Munoe v. International Alliance of Theatrical State Employees & Moving Picture Mach. Operators*, 563 F.2d 205, 207 n. 1 (5th Cir.1977); C. Wright, A. Miller, & M. Kane, 10A Fed.Prac. & Proc. § 2738, at 470 & n. 7, 474 & n. 12 (2d ed. 1983).

[22] Fed.R.Evid. 702; *see also Washington v. Armstrong World Indus.*, 839 F.2d 1121, 1123 (5th Cir.1988); *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir.1985).

court, even in cases in which the court has no opportunity to observe the witness firsthand; the court's ruling therefore "must be sustained unless manifestly erroneous."[23] Despite this broad discretion, district and appellate courts must carefully review the testimony of a purported expert witness to ensure that the witness has the necessary qualifications and that there is a sufficient basis for his opinion.[24]

Blundell's academic credentials are impressive. He holds a doctorate in mechanical engineering and a master's degree in production engineering and, at the time that he was deposed, taught courses on the former subject as a professor at the University of Missouri. Further, although Blundell had never designed a press brake or safeguards for that device, he had had at least some practical experience designing mechanical devices similar to the press brake and safeguards suitable for those devices, both in his capacity as production manager of his family's manufacturing business and in his capacity as associate director of the university's safety design center. While serving in the former capacity, Blundell testified, he had designed several small power presses and had specified and installed safety systems for a variety of power presses, including a forty-ton punch press. Finally, we note that prior to this litigation, Blundell had been qualified in other courts around the country to testify as an expert on the subject of designing safeguards for

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[23] *Christophersen v. Allied-Signal Corp.*, 902 F.2d 362, 364 (5th Cir.1990); *Washington*, 839 F.2d at 1123; *see also Crawford v. Worth*, 447 F.2d 738, 741 (5th Cir.1971).

[24] *Peteet v. Dow Chem.*, 868 F.2d 1428, 1431 (5th Cir.1989).

divices similar to press brakes. Under these circumstances, we cannot fault the district court for its decision to accept Blundell as an expert.[25]

Niagara contends, nevertheless, that because Blundell's knowledge of the particular divide under scrutiny here – the press brake – was purely academic, that is, he learned everything he knew about the device and safety systems suitable for it through reviewing technical literature rather than through hands-on experience, Blundell was not an expert on the subject of designing safeguards for that particular device. The legal assumption on which this contention rests is that an "academic" who has had no practical experience designing a particular product cannot be qualified to testify as an expert concerning the design of that product in a product liability action. The assumption is erroneous.

Rule 702 provides that a witness may be qualified as an expert "by knowledge, skill, experience, training, *or* education."[26] The disjunctive conjunction, which we must assume the drafters of the rule chose deliberately, suggests than an expert may be qualified on any of the five bases listed.[27] A witness therefore can qualify as an expert even though he lacks practical experience, provided that he has received suitable training or education or has otherwise gained the requisite knowledge or

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[25] *See DaSilva v. American Brands*, 845 F.2d 356, 360 (1st Cir.1988).

[26] Fed.R.Evid. 702 (emphasis added).

[27] *See Garrett v. Desa Indus., Inc.*, 705 F.2d 721, 724 (4th Cir.1983).

skill.[28] Thus, although the absence of hands-on experience is certainly relevant to the determination whether to accept a witness as an expert, it is not determinative.

The rule advocated by Niagara not only is inconsistent with the language of Rule 702, but also would work an undue hardship on plaintiffs in product liability actions. Recognizing this problem, other federal appeals courts have squarely rejected this proposal.[29] As the First Circuit stated in *Da Silva v. American Brands*,[30]

> [s]uch an approach would often mean that the only experts who could testify regarding a machine are those who have an interest in defending its design. We therefore are not persuaded to abandon the general rule that a court should consider all relevant qualifications when ruling on the admissibility of expert testimony.[31]

This court's decision in *Perkins v. Volkswagen*,[32] on which Niagara relies, does not demand a different conclusion. The plaintiff's expert witness held a degree in mechanical engineering but had no experience in designing entire automobiles. For this reason, the district court accepted the witness as an expert on the subject of general mechanical engineering principles, but refused to allow him to testify on the subject of automotive design.

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[28] *Id.* at 724.

[29] *See id.* at 724; *DaSilva*, 845 F.2d at 361; *Mannino v. International Mfg.*, 650 F.2d 846, 850 (6th Cir.1981); *Knight v. Otis Elevator Co.*, 596 F.2d 84, 88 (3d Cir.1979).

[30] 845 F.2d 356 (1st Cir.1988).

[31] *Id.* at 361.

[32] 596 F.2d 681 (5th Cir.1979).

On appeal, the plaintiff complained of the restriction placed on his expert's testimony. This court affirmed, concluding that the district court's decision was not "manifestly erroneous."[33] The affirmation of the district court's ruling therefore means merely that if a district court refuses to allow one who has received only academic training to testify as an expert concerning product design, its decision may be affirmed. It clearly does not mean that if a district court faced with the same circumstances rules the other way, its decision will be overturned.

For these reasons, we conclude that the district court did not err by accepting Blundell as an expert on the subject of designing safety systems for press brakes.

III

The next issue presented for our consideration is whether the district court, after taking Blundell's deposition into account, correctly denied Lavespere's motion for reconsideration of the summary judgment. Lavespere and Liberty Mutual attack the district court's decision on two grounds. First, the court misinterpreted and misapplied both the law governing summary judgments and the applicable substantive law. Second, it was improper for the court to grant Niagara's supplemental motion for summary judgment after having denied its original motion for summary judgment, for Niagara presented no new evidence in support of the supplemental motion. We address each of these contentions in turn.

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[33] *Id.* at 682.

A

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Review of a district court's ruling on a motion for summary judgment is plenary.[34] The appeals court applies the same standards as those that govern the district court's determination.[35]

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."[36] To determine whether there are any genuine issues of material fact, the court must first consult the applicable substantive law to ascertain what factual issues are material.[37] Having done that, the court must review the evidence bearing on those issues, viewing the facts and inferences therefrom in the light most favorable to the nonmoving party.[38] Before it can find that there are no genuine material factual issues, the court must be satisfied that no reasonable trier of fact could have found for

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[34] *See Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 79 (5th Cir.1987); *FDIC v. Dye*, 642 F.2d 837, 841 (5th Cir.1981) (order granting summary judgment is subject to "independent review").

[35] *Lodge Hall*, 831 F.2d at 79.

[36] Fed.R.Civ.P. 56(c).

[37] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Williams v. Adams*, 836 F.2d 958 (5th Cir.1988).

[38] *Lodge Hall*, 831 F.2d at 79.

the nonmoving party,[39] or in other words, that the evidence favoring the non-moving party is insufficient to enable a reasonable jury to return a verdict in her favor.[40]

In the summary-judgment context, the rules governing burden of proof are critically important. The moving party bears the burden of establishing that there are no genuine issues of material fact.[41] To satisfy this burden, the moving party may either submit evidentiary documents that negate the existence of some material element of the nonmoving party's claim or defense or, if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmoving party's claim or defense.[42] Once the moving party makes that showing, however, the burden shifts to the nonmoving party to show that summary judgment is not appropriate.[43] The nonmoving party cannot discharge that burden by referring to the "mere allegations or denials" of the nonmoving party's pleadings; rather, that party

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[39] *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1248, 89 L.Ed.2d 538 (1986); *Bache v. American Tel. & Tel.*, 840 F.2d 283 (5th Cir.1988).

[40] *Anderson*, 477 U.S. at 249, 106 S.Ct. at 2511.

[41] *Lodge Hall*, 831 F.2d at 79; *see also* 10A C. Wright, A. Miller, & M. Kane, § 2727, at 121.

[42] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Isquith v. Middle South Utils.*, 847 F.2d 186, 198 (5th Cir.1988).

[43] *Lodge Hall*, 831 F.2d at 79; *see also* 10A C. Wright, A. Miller, & M. Kane, § 2727, at 143-45 & nn. 28 & 29.

must, either by submitting opposing evidentiary documents or by referring to evidentiary documents already in the record, set out specific facts showing that a genuine issue exists.[44]

Whether summary judgment is appropriate may depend in part on the nature of the issues before the court. For example, this court has consistently declared that "the use of summary judgment is rarely appropriate in negligence or products liability cases, even where the material facts are not disputed."[45] In *Fontenot v. Upjohn Co.*,[46] this court explained the reasons behind that principle:

> An inherently normative issue, such as whether a product is impermissibly dangerous or was defectively designed, is not, of course, susceptible to summary judgment. . . . The evidence requires balancing by the jury of the utility of the product against the likelihood of, and gravity of, injury from its use.[47]

Nevertheless, this court has upheld summary judgments in products liability actions finding that the evidence was insufficient to create a genuine issue of material fact

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[44] Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553; *Isquith*, 847 F.2d at 198-99.

[45] *Trevino v. Yamaha Motor Corp.*, 882 F.2d 182, 184 (5th Cir.1989); *Miller-Schmidt v. Gastech, Inc.*, 864 F.2d 1181, 1185 (5th Cir.1989); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1196 (5th Cir.1986); *Davidson v. Stanadyne*, 718 F.2d 1334, 1338 (5th Cir.1983).

[46] 780 F.2d 1190 (5th Cir.1986).

[47] *Id.* at 1196.

concerning the defendant's alleged failure to comply with that normative standard.[48]

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Although it is clear that Louisiana law governs Lavespere's right to recover, it is not clear *what* Louisiana law governs. After Lavespere's accident and the initiation of this litigation but before the rendition of judgment, the Louisiana Legislature enacted the Louisiana Products Liability Act[49] (LPLA or the Act). The legislation was designed to modify Louisiana's law of strict products liability in several respects, including the requisites for recovery in cases based on claims of defective or unreasonably dangerous product design.[50] Because Lavespere's case rests on such a claim,[51] we must ascertain the particular respects in which the Act changes the law, determine whether those changes have any possible significance for the success of his case, and, if so, consider whether the

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[48] *See Trevino*, 882 F.2d at 184-86; *Miller-Schmidt*, 864 F.2d at 1185.

[49] La.Rev.Stat.Ann. §§ 9:2800.51-.2800.59 (West Supp.1990) (effective Sept. 1, 1988).

[50] *See* Crawford, Developments in the Law, 1987-1988 – Torts, 49 La.L.Rev. 543, 543-44 (1988); Kennedy, A Primer on the Louisiana Products Liability Act, 49 La.L.Rev. 565, 587-88, 606-10 (1989); Galligan, the Louisiana Products Liability Act: Making Sense of It All, 49 La.L.Rev. 629, 630-32, 634-38 (1989); Comment, Retroactive Application of the Louisiana Products Liability Act: A Civilian Analysis, 49 La.L.Rev. 939, 942-46 (1989).

[51] *See infra* text accompanying notes 55 & 56.

relevant provisions of the Act should be retroactively applied.

The law of products liability in force in Louisiana at the time of Lavespere's accident was set out in the landmark case of *Halphen v. Johns-Manville Sales Corp.*[52] In order to recover from a manufacturer, the plaintiff was required to prove, among other things, that the product which injured him was "unreasonably dangerous to normal use."[53] The plaintiff could make this showing by establishing that the product was "unreasonably dangerous per se," suffered from some flaw in construction or composition, lacked adequate warnings, or exhibited a "defective" design.[54] A design could be considered defective for any of a number of reasons: (i) "the danger-in-fact, whether foreseeable or not, outweighs the utility of the product"; (ii) although the utility of the product outweighs its risk, "alternative products were available to serve the same needs or desires with less risk of harm; or (iii) although the utility of the product outweighs its risk, "there was a feasible way to design the product with less harmful consequences."[55]

Of these theories of recovery, the third defective-design theory best corresponds with Lavespere's claim. Lavespere does not contend that the press brake's danger-in-fact outweighs its utility or that there were other products available to do the same work as that performed

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[52] 484 So.2d 110 (La.1986).

[53] *Id.* at 113.

[54] *Id.* at 113-15.

[55] *Id.* at 115.

by the press brake. Instead, he faults Niagara for failing to incorporate into the press break various kinds of safety devices such as "dual-hand controls," the "interlock guard," or the "distance bar." Courts inside and outside Louisiana have unanimously concluded that claims regarding the absence of safety devices should be treated as claims of defective design.[56]

The *Halphen* decision left many important questions unanswered, including precisely what showing a plaintiff who relied on the third defective-design theory was required to make in order to carry his burden of proof.[57] Some critics of *Halphen* have argued that in order to prevail on that theory, the plaintiff had only to show that it was possible to design a safer product. According to these commentators, the plaintiff had no obligation to show, for example, that the risks avoided by switching to the safer product design would have outweighed the costs of making the switch (added construction costs and lost product utility, if any) and, further, the defendant

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[56] *See Thompson v. Tuggle*, 486 So.2d 144, 159 (La.App.1986) (Domengeaux, J., dissenting); *see also Fabian v. E.W. Bliss Co.*, 582 F.2d 1257, 1261 (10th Cir.1978) (construing New Mexico law); *Tuts v. Bethlehem Steel Corp.*, 91 Cal. App.2d 372, 381, 154 Cal.Rptr. 122, 128 (1979); *Davis v. Caterpillar Tractor Co.*, 719 F.2d 324, 327 (Colo.App.1985); *Solimene v. B. Grauel & Co., K.G.*, 399 Mass. 790, 797, 507 N.E.2d 662, 667 (1987); *Scott v. Allen Bradley*, 139 Mich. App. 665, 670-71, 362 N.W.2d 734, 737 (1984); *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 624-25 (Minn.1984); *Knitz v. Minster Mach. Co.*, 69 Ohio St.2d 460, 466-68, 432 N.E.2d 814, 819 (1982).

[57] *See* Galligan, *supra* note 50, at 659 & n. 171.

could not have defeated the plaintiff's claim by showing the contrary.[58]

This interpretation is doubtful at best. The scholars from whose works the *Halphen* court derived its third defective-design theory suggest, in the very same works, that the balance of costs and benefits associated with switching to the alternative design ought to be a critical element in determining its "feasibility."[59] Dean Keeton, for example, suggested that an alternative product design should be considered "feasible" only if

> a reasonable person would conclude that the magnitude of the danger-in-fact that could have been avoided by the alternative design in the utilization of the scientific technological know-how reasonably available to the defendant outweighed the financial costs of guarding against such avoidable danger, the impairment of the benefits, and any new danger-in-fact that would have been created by the alternative design.[60]

It seems unlikely that the state supreme court, having derived its "feasible alternative" design theory from Dean Keeton's works, would have rejected his definition of the key term "feasible." That the Louisiana high court

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[58] *See* Crawford, Developments in the Law, 1985-1986-Torts, 47 La.L.Rev. 485, 486-87 (1986); Kennedy *supra* note 50, at 607 & n. 174.

[59] *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on the Law of Torts § 99, at 699-700 (5th ed. 1984) [hereinafter Prosser & Keeton on Torts]; Keeton, Annual Survey of Texas Law – Torts, 35 Sw. L.J. 1, 9, 12-13.

[60] Prosser & Keeton on Torts, *supra* note 59, § 99, at 700; *see also* Keeton, supra note 59, at 12-13.

would have adopted this definition appears all the more likely when one considers that several state courts which have recognized liability for failure to use a safer, alternative feasible design have defined feasibility in precisely this manner.[61] Further, a rule that excludes risk-utility balancing in determining liability for failure to use a safer, feasible alternative design would have grave economic consequences, consequences that the *Halphen* opinion indicates no intention to ignore.

While we therefore are confident that the state supreme court would consider a cost-benefit analysis to be relevant to the plaintiff's right to recover under *Halphen's* feasible "alternative" design theory, we are not at all certain how the court would apportion the burden of proof on this matter between the plaintiff and the defendant. As we have already suggested, *Halphen* did not directly address this question. Since the announcement of that decision, neither the supreme court nor any of the state appellate courts has faced the issue. Finally, in those jurisdictions other than Louisiana in which the feasible-alternative design theory has been recognized, there is considerable disagreement.[62] In some

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[61] *See Brady v. Melody Homes Mfr.*, 121 Ariz. 253, 258-59, 589 P.2d 896, 901-02 (Ct.App.1978); *Duke v. Gulf & W. Mfg. Co.*, 660 S.W.2d 404, 413 (Mo.Ct.App.1983); *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 67-70, 577 P.2d 1322, 1326-27 (1978) (*en banc*); *Lamon v. McDonnell Douglas Corp.*, 91 Wash.2d 345, 351, 588 P.2d 1346, 1350 (1979).

[62] *See generally* Birnbaum, Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence, 33 Vand.L.Rev. 593, 602-10, 627-30 (1980); Wade, On Product "Design Defects" and Their Actionability, 33 Vand.L.Rev. 551, 558-66, 573-75 (1980).

jurisdictions, the burden is on the defendant to show that the added costs and diminished utility entailed in the alternative design would outweigh its incremental benefits over the existing design.[63] At the other extreme, some jurisdicitons require the plaintiff to show the contrary, that is, that the additional risks avoided by the alternative design outweigh the costs associated with adopting it.[64]

Berfore the supreme court could answer this and the other questions left unanswered by *Halphen*, the Louisiana Legislature enacted the Louisiana Products Liability Act.[65] (LPLA), which evidently was designed to overrule *Halphen* in several respects. Among the targets of the legislation were *Halphen's* theories of recovery for defective design.[66] Section 2800.56 provides that a product is unreasonably dangerous in design if:

> (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and
>
> (2) The likelihood that the product's design would cause the claimant's damage and the gravity of the damage outweighed the burden

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[63] *Taggart v. Richards Medical Co., Inc.*, 677 F.Supp. 1102, 1103-04 (D.Colo.1988) (construing Colorado law); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 884-86 (Alaska 1979); *Barker v. Lull Eng'g Co., Inc.*, 20 Cal.3d 413, 418, 573 P.2d 443, 446, 143 Cal.Rptr. 225, 228 (1978).

[64] *Owens v. Allis-Chalmers Corp.*, 414 Mich. 413, 429-32, 326 N.W.2d 372, 378-79 (1982); *Wilson*, 282 Or. at 68-70, 577 P.2d at 1326-27.

[65] La.Rev.Stat.Ann. §§ 9:2800.51-:2800.59 (West Supp.1990).

[66] *See* Crawford, *supra* note 50, at 544; Kennedy, *supra* note 50, at 607-08.

- on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product.[67]

According to Section 2800.54 D,[68] the plaintiff bears the burden of proving both of these elements.[69]

Section 2800.56 effects two changes in the law. First, the new section imposes on the plaintiff the requirement of showing that an algnrnative (sic) design was *in existence* at the time the product left the manufacturer's hands. Although the *Halphen* decision did not directly address the matter, it was widely believed that the decision would have permitted the plaintiff to recover simply by showing that a design modification capable of preventing the accident was theoretically possible.[70] Second, the section modifies, or at least clarifies, the plaintiff's burden of proof by requiring him to show not only that there was an alternative, safer design, but also that the risk avoided by using the alternative design (magnitude of damage discounted by the likelihood of its occurrence) would have exceeded the burden of switching to the alternative design (added construction costs and loss of product utility). As we noted earlier, it is unclear whether the plaintiff bore this burden under *Halphen*. It is at least clear, however, that this risk-utility factor would have been a matter of defense.

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[67] La.Rev.Stat.Ann. § 9:2800.56 (West Supp.1990).

[68] *Id.* § 2800.54 (D) (West Supp.1990).

[69] *See also* Kennedy, *supra* note 50, at 597-99; Galligan *supra* note 50, at 670, 674-75.

[70] *See* authorities collected in note 58, *supra*.

Only the second of these changes could make any possible difference to the success of Lavespere's case. Considering the testimony of Blundell that foreign and domestic manufacturers had implemented the design modifications he proposed years before the manufacture of the press that injured Lavespere, we are convinced that he would have satisfied the new "in existence" requirement of section 2800.56(1), assuming that it had applied to him. Whether his evidence was sufficient to satisfy the new "risk-utility" requirement of section 2800.56(2) is a more difficult question. It is therefore necessary to consider whether that provision of the Act should be given retrospective force.

The Louisiana Legislature's most recent expression on the subject of "retroactivity of laws" is found in article 6 of the Louisiana Civil Code:

> In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.[71]

This article reproduces the substance of former article 8,[72] which provided that new laws were to have prospective effect only, but incorporates the exceptions that the state's courts had engrafted onto both that article and a related "retroactivity of laws" statute, Louisiana Revised Statute

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[71] La.Civ.Code Ann. art. 6 (West 1990) (effective Jan. 1, 1988).

[72] La.Civ.Code Ann. art. 8 (1870).

1:2.[73] Under the new article, the court must engage in a two-fold inquiry. First, the court must ascertain whether the legislature expressed an intention that the legislation be applied retroactively or prospectively only. If it did, the inquiry is at an end. If it did not, then the court must ascertain whether the legislation is substantive or procedural.[74]

We are satisfied that the legislature did not express any intention concerning the temporal effect of section 2800.56(2) or, for that matter, any of the provisions of the LPLA. Indeed, it is clear that the legislature went out of its way to remain mute on this subject. Although the Senate version of the Act contained a provision purporting to make the Act apply prospectively only,[75] that provision was deleted as part of a legislative compromise.[76] The final version of the legislation provides merely that "[t]his Act shall become effective September 1, 1988."[77]

Resolution of the retroactivity question therefore turns on the classification of the legislation. Here we are concerned only with the provision in the LPLA that changes the plaintiff's burden of proof in an alternative

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[73] La.Rev.Stat.Ann. § 1:2 (West 1987) ("No Section of the Revised Statutes is retroactive unless it is expressly so stated.").

[74] *See Ardoin v. Hartford Accident & Indem. Co.*, 360 So.2d 1331, 1338-39 (La.1978).

[75] *See* 1988 La Sess L.Serv. 684 § 2 (West) ("This Act shall become effective September 1, 1988 and shall apply to all causes of action for damage sustained on or after that date.")

[76] *See* Kennedy, *supra* note 50, at 625.

[77] 1988 La. Acts No. 64, § 2.

design case, section 2800.56(2). It is well settled in Louisiana that laws affecting burden of proof are "procedural" as that term is used in Civil Code article 6.[78] Consequently, 2800.56(2) applies retroactively, at least in those cases in which its application does not raise problems of constitutional dimension.[79] We discern no such problems here.

One might object that our conclusion is at odds with that reached by the Louisiana Court of Appeal, Second Circuit, in *McCoy v. Otis Elevator Co., Inc.*[80] In that case, the plaintiff sued the manufacturer of a freight elevator, arguing that the elevator in which he had been injured was "unreasonably dangerous per se." In its defense, the manufacturer, which recognized that the LPLA had eliminated "unreasonably dangerous per se" as a theory of recovery, argued that the Act applied retroactively. The appellate court disagreed. Noting that the Act "defines the causes of action available under products liability and excludes the unreasonably dangerous per se category of recovery," the court concluded that the legislation was "substantive" and, therefore, should be applied prospectively only.[81]

The *McCoy* court was called on to consider whether the Act retroactively eliminated the cause of action for products that are unreasonably dangerous per se. Thus,

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[78] *Ardoin*, 360 So.2d at 1339; *Succession of Sanders*, 485 So.2d 126, 131 (La.App.1986); *see also* Comment, *supra* note 50, at 946.

[79] *See Lott v. Haley*, 370 So.2d 521, 523-24 (La.1979).

[80] 546 So.2d 229 (La.App.1989).

[81] *Id.* at 232.

the only question before the court was a narrow one: whether the "exclusivity of remedies" clause found in Louisiana Revised Statute 9:2800.54,[82] which had the effect of eliminating that cause of action, should be retroactively applied. The court was not required to consider, as we are here, the quite different question whether other provisions of the Act that are merely procedural should be given retrospective effect. To the extent that the court's remarks concerning the retroactive effect of the Act may be construed to apply to this question, those remarks are dicta.[83]

Having determined that section 2800.56(2) applies retroactively, we are now in a position to determine whether Lavespere presented sufficient evidence to survive Niagara's motion for summary judgment. In order defeat that motion, Lavespere was required to present evidence sufficient to enable a reasonable trier of fact to conclude that he had established the essential elements of his claim, including that the risk avoided by the alternative design outweighed the burden of adopting that design.

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[82] La.Rev.Stat.Ann. § 9:2800.54 (A) (West Supp.1990).

[83] Louisiana courts have on occasion accorded different provisions of a legislative act varying temporal effects. *Compare Tullier v. Tullier*, 464 So.2d 278, 282-83 (La.1985) (the "presumption of community" established in La.Civ.Code art. 2340 (enacted in 1979 La. Acts No. 709, § 1) applies retroactively) *with Hebert v. Weaver*, 484 So.2d 743, 745-46 (La.App.1986) (La.Civil Code arts. 2345 & 2357 (enacted in 1979 La. Acts No. 709 § 1) apply prospectively only).

Although Lavespere introduced evidence that had some bearing on the risk-utility issue, it was not sufficient to carry the day. Lavespere offered no evidence concerning the extent of the risk that the alternative design would have avoided. In particular, Lavespere offered no evidence concerning the frequency of accidents like his own, the economic costs entailed by those accidents, or the extent of the reduction in frequency of those accidents that would have followed on the use of his proposed alternative design.

Further, Lavespere introduced little, if any, evidence concerning the burden of switching to the alternative design. Neither in Blundell's deposition nor in any other document submitted by the parties is there any indication of the costs that the manufacturer would have incurred had it used the alternative design.

Perhaps the most significant failure of Lavespere's proof, however, was on the matter of the loss of product utility that use of the alternative design would have occasioned. Lavespere did provide information, through the deposition of Blundell, that the safeguards he proposed would be compatible with "the vast majority" and "maybe eighty-five percent" of the press brake's possible applications, information suggesting that the safeguards would be wholly or partly incompatible with at least fifteen percent of its possible applications. The record contains no information, however, on the following crucial points: whether the excluded operations could be performed by another device and, if not, what consequences the loss of these operations might have for the metal works industry; assuming that another device could be used, the additional cost to metal works firms of

purchasing and maintaining two devices (the modified general-purpose press brake and the other device) instead of one; and, assuming that the safeguards of the modified press brake could be disengaged so that the excluded operations could be performed, the cost to manufacturers to make the safeguards disengagable and the cost to press brake purchasers to disengage and reengage the safeguards. In short, there is no evidence concerning the nature and extent of the economic problems likely generated by rendering the press brake unfit for at least fifteen percent of its possible uses.

Under the circumstances, we have little difficulty concluding that Lavespere's evidence was insufficient to defeat Niagara's motion for summary judgment. His proof of the risk that might have been avoided by the alternative design and of the burden that switching to that design would have entailed was, to say that least, incomplete. Faced with this meagre evidence, no reasonable trier of fact could have concluded that the balance of those two factors tipped in favor of the risk avoided. One cannot balance items of indeterminate weight.[84]

In arriving at this result, we do not mean to suggest that the plaintiff must, in every case, introduce evidence that details and quantifies the risk avoided and the burden incurred in order to prevail under the defective design theory set out in the LPLA. As courts in other jurisdictions that have placed on plaintiffs the burden of proof on the risk-utility issue have suggested, there may

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[84] *See generally Owens v. Allis-Chalmers Corp.*, 414 Mich. 413, 431-32, 326 N.W.2d 372, 378-79 (1982); *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 68-69, 577 P.2d 1322, 1327 (1978).

be cases in which the judge or the jury, by relying on background knowledge and "common sense," can "fill in the gaps" in the plaintiff's case, estimating the extent of the risk avoided, the costs of implementing the proposed design change, or the adverse effect of the design modification on the utility of the machine.[85] For this to be possible, however, the product itself, or at least the design feature in question, must be relatively uncomplicated, and the implications of the change in design must be such that a layman could readily grasp them.[86] That clearly is not the case here.

Because we have disposed of this case on the basis of the LPLA, we find it unnecessary to consider in detail the pre-LPLA state intermediate appellate court decisions that formed the focal point of the parties' and the district court's attention: *Leonard v. Albany Machine & Supply Co.*,[87] *Lanclos v. Rockwell International Corp.*,[88] and *Sawyer v. Niagara Machine & Tool Works*,[89] We point out, however, that we do not agree with Niagara's proposed reading of *Sawyer*. According to Niagara, that case establishes the rule that in an alternative-design case, the defendant is entitled to judgment as a matter of law provided that the

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[85] *141 S. Main, Inc. v. Magic Fingers, Inc.*, 49 Ill.App.3d 724, 728-29, 364 N.E.2d 605, 608 (1977); *Duke v. Gulf & W. Mfg. Co.*, 660 S.W.2d 404, 412-13 (Mo.App.1983); *Wilson*, 282 Or. at 67-70, 577 P.2d at 1326-27.

[86] *Wilson*, 282 Or. at 68-70, 577 P.2d at 1326-27; *Duke*, 660 S.W.2d at 412-13.

[87] 339 So.2d 458 (La.App.1976).

[88] 470 So.2d 924 (La.App.1985).

[89] 535 So.2d 1057 (La.App.1988).

following conditions are satisfied: the product is not sold as a completed unit, the product can be integrated into any number of larger manufacturing systems to perform a variety of different functions, no operator safeguard suitable for one hundred percent of those functions can be devised, and it is the custom of the industry to leave the duty for installing safeguards to industrial users. Admittedly, the opinion does contain language that lends some support to this interpretation. This interpretation, however, ignores the fact that the *Sawyer* court's remarks were made on review of a post-trial judgment in favor of the defendant, a judgment reviewed under a "substantial evidence" standard. As we read the decision, it establishes no more than that if the conditions listed above are satisfied, the trier of fact *may* find in favor of the defendant. The decision certainly does not preclude a trier of fact from finding in favor of a plaintiff who presents proof that his proposed safeguard, though not compatible with all the product's uses, is compatible with most of them, and proof that the risk avoided by the alternative design outweighs, the burden of switching to that design.

B

Liberty Mutual contends that the district court's ruling granting Niagara's supplemental motion for summary judgment was improper given that the court had denied Niagara's original motion for summary judgment and that Niagara presented no new evidence in support of the supplemental motion. According to Liberty Mutual, it is utterly "inexplicable" how a court could one day conclude that there are genuine issues of material

fact and later, without the benefit of any additional evidence, conclude to the contrary.

We reject this argument for two reasons. First, we do not find the district court's behavior at all inexplicable. After the ruling on the original motion but before the ruling on the supplemental motion, the Louisiana Court of Appeal, Second Circuit decided *Sawyer v. Niagara Machine & Tool Works, Inc.*[90] a case that the district court concluded changed, or at least clarified, the applicable law and, in so doing, redefined the "material issues." Although we do not adopt the district court's reading of that case, we acknowledge that a new decision clarifying the applicable substantive law may justify reexamining a denial of summary judgment.[91] Second, because the denial of a motion for summary judgment is an interlocutory order, the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law.[92]

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[90] *Id.*

[91] *See Kenyatta v. Moore*, 623 F.Supp. 220, 222-23 (S.D.Miss.1985).

[92] Fed.R.Civ.P. 54(b); *Bon Air Hotel v. Time, Inc.*, 426 F.2d 858, 862 (5th Cir.1970).

James R. LAVESPERE,
Plaintiff-Appellant
Cross-Appellee,

and

Liberty Mutual Insurance Co.,
Intervenor-Appellant
Cross-Appellees,

v.

NIAGARA MACHINE & TOOL WORKS, INC., Defendant-Appellee Cross-Appellant.

No. 89-4208.

United States Court of Appeals,
Fifth Circuit.

Dec. 18, 1990.

Henry B. Bruser, III, Gold, Weems, Bruser, Sharp, Sues & Rundell, Alexandria, La., for Lavespere.

Steven P. Mansour, Michael T. Johnson, Bolen Erwin, Johnson & Coleman, Alexandria, La., for Liberty Mut. Ins. Co.

Brian D. Smith, Lunn, Irion, Johnson, Salley & Carlisle, Shreveport, La., for Niagara Mach. & Tool Works, Inc.

Carl J. Barbier, Louisiana Trial Lawyers Ass'n, New Orleans, La., for amicus curiae.

Appeals from the United States District Court for the Western District of Louisiana.

ON PETITION FOR REHEARING

(Opinion August 13, 1990, 5th Cir. 1990, 910 F.2d 167)

Before RUBIN, JONES, and BARKSDALE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The application for rehearing asserts that our original decision[1] erroneously held the procedural provisions of the Louisiana Products Liability Act[2] applicable to this case even though that law was adopted after the cause of action had accrued, relying on several Louisiana intermediate appellate court opinions stating categorically, albeit cryptically, that the law is not retroactive. The proposition that, in general, the Louisiana Products Liability Act is prospective is accurate, but its unqualified application to the burden-of-proof provision of the law is not.

In our original opinion we held that, as Article 6 of the Louisiana Civil Code provides, the substantive parts of the LPLA apply only prospectively "in the absence of contrary legislative expression." Finding that the legislature "went out of its way to remain mute"[3] on retroactivity because a provision purporting to make the law apply prospectively only was deleted as part of a legislative compromise, we interpreted the temporal application

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[1] *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167 (5th Cir.1990).

[2] La.Rev.Stat.Ann. § 9:2800.51 *et seq.* (West Supp.1990)

[3] *Lavespere*, 910 F.2d at 182.

of the law in accordance with the interpretive prescription of the Louisiana Civil Code: "[s]ubstantive laws apply prospectively only. Procedural laws apply *both* prospectively and retroactively, unless there is legislative expression to the contrary."[4] Our opinion that the Louisiana legislature was deliberate in failing to prescribe explicitly the chronological reach of various provisions of the statute is buttressed by the fact that an effort was made in the Second Extraordinary Session of the 1988 Louisiana Legislature to enact a rule that "all provisions" of the LPLA "shall have prospective application only." This was vetoed by the Governor as being beyond his call for the session, hence unconstitutional.[5] Lavespere's argument that the legislature thus expressed a will with legally binding effect despite the failure of the effort to become law is sophistic. The failure of the legislative effort fortifies our conclusion that, as originally adopted and still in force, the LPLA contains no provision determinative of the nonretroactivity of its procedural provisions. Accordingly, we held the burden-of-proof provision of the law procedural, hence applicable to pending cases.

Having reviewed that opinion and the Louisiana intermediate appellate court opinions relied on in the application for rehearing, we deny the application.

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[4] LaCiv.Code Ann. art. 6 (West 1990), reproducing the substance of La.Civ.Code Ann. art. 8 (1870).

[5] Kennedy, A Primer on the Louisiana Products Liability Act, 49 La.L.Rev. 565, 625-626 n. 248 (1989).

The Louisiana Supreme Court has never discussed the issue before us. Under the *Erie*[6] doctrine that state law is applicable in a federal diversity jurisdiction case, state intermediate appellate court decisions constitute indicia of state law[7] even when decided after a federal court has rendered a contrary opinion if the federal judgment has not yet become final.[8] Such decisions, if applicable, should, therefore, be followed absent a strong showing that the state supreme court would rule differently.[9]

Despite offhand and unqualified statements, none of the rulings in the Louisiana intermediate appellate court opinions dictates a result contrary to the conclusion we have reached. In none of the Louisiana cases was burden of proof involved. In none of them did the appellate court determine whether the burden-of-proof provision, being procedural, as distinguished from the substantive provisions of law, applies to pending cases. In none did the court consider the applicability of the principles of statutory construction set forth in the Civil Code.

In *Frederick v. General Motors Corporation,*[10] decided in May, 1989, the Louisiana Court of Appeal for the Third Circuit in a footnote explaining its application of the

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[6] *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1939).

[7] *Birmingham Fire Ins. Co. of Pa. v. Winegardner & Hammons, Inc.,* 714 F.2d 548, 550 (5th Cir.1983).

[8] *See Exxon Co., U.S.A. v. Banque de Paris et des Pays-Bas,* 488 U.S. 920, 109 S.Ct. 299, 102 L.Ed.2d 319 (1988) (mem.).

[9] *Taylor v. Jim Walter Corp.,* 731 F.2d 266 (5th Cir.1984); *but see Green v. Walker,* 910 F.2d 291, 294 (5th Cir.1990).

[10] 544 So.2d 757 (La.App. 3d Cir.1989).

substantive rules of liability set forth in *Halphen v. Johns-Manville Sales Corporation,*[11] stated:

> Some of the principles established in *Halphen* were legislatively overruled by the Louisiana Products Liability Act, Acts 1988, No. 64. The effective date of this act was September 1, 1988, and *has no bearing on this case.*[12]

A month later, in *Lopez v. Chicago Bridge and Iron Company,*[13] the same court affirmed a trial court ruling excluding evidence that an alleged manufacturer of the defective product was in fact its maker. After reviewing the evidence, the court said it found "no error in the court's treatment of [one defendant] as the manufacturer . . . and its evidentiary ruling which excluded detailed testimony that [another defendant] was the manufacturer. In accord see LSA-R.S. 9:2800.53(1) and (1)(a), which, though not applicable retroactively, are nonetheless supportive of this conclusion."[14] This aside does not even refer to the burden-of-proof section of the Act.

The Louisiana Court of Appeal for the Fifth Circuit, in *McCrossen v. Renovate, Inc.,*[15] an opinion rendered on July 31, 1989, referred to the effective date of the Products Liability Act but only in connection with the safer-alternative-design theory of recovery, stating that this theory is recognized in Louisiana, citing a 1987 Louisiana case, and adding: "*See also* Louisiana Products Liability Act,

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[11] 484 So.2d 110 (La.1986).

[12] *Frederick,* 544 So.2d at 761 n. 3 (emphasis added).

[13] 546 So.2d 291 (La.App. 3d Cir.1989).

[14] *Id.* at 295.

[15] 548 So.2d 92 (La.App. 5th Cir.1989).

LaR.S. 9:2800.51 *et seq.*, added by Acts 1988, which was not in effect at the time of the events complained of."[16] Like the other opinions cited, this does not even refer to the burden-of-proof provision and its general reference to the LPLA can hardly be taken as constituting a determination of the principles of Louisiana law applicable here. For the same reason the reference in *Traut v. Uniroyal, Inc.*[17] and *Breeden v. Valencia, Inc.*[18] are not determinations of the issue. In each the court considered claims to recover based on inadequate warning and said in almost identical footnotes:

"The Louisiana Products Liability Act, Acts 1988, No. 64, which superseded some of the principles of *Halphen,* was effective September 1, 1988, and is not applicable to the instant case,"[19] and "Some of the principles of *Halphen* were superseded by the Louisiana Products Liability Act, Acts 1988, No. 64. That Act, effective September 1, 1988, is not applicable to this case."[20]

Consonant with these decisions, our original opinion held the substantive parts of the Act applicable only prospectively. We fail to find in any of the Louisiana cases even consideration of, let alone a determination that, the procedural provision was so limited.

Most recently, on June 20, 1990, the Louisiana Court of Appeal for the Second Circuit, in *Berry v. Commercial*

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[16] *Id.* at 94.

[17] 555 So.2d 655 (La.App. 4th Cir.1989).

[18] 557 So.2d 302 (La.App. 4th Cir.1990).

[19] *Id.* at 308 n. 5.

[20] *Traut,* 555 So.2d at 656 n. 1.

Union Insurance Company,[21] considered the availability of the state-of-the-art defense to a pre-LPLA claim. Stating that the Act "affects *substantive* rights and is therefore prospective only," the court refused to apply it but instead applied *Halphen.*[22] The court obviously did not consider whether part of the Act might be procedural and, hence, retroactive.

In our original opinion we distinguished *McCoy v. Otis Elevator Company.*[23] The application for rehearing faults our failure to note that the Louisiana Supreme Court denied writs in that case, a denial which is inconsequential not only because the case presents a different situation from *Lavespere,*[24] but because the Louisiana Supreme Court has long held that the denial of writs in a civil case has no precedential effect.[25]

We find no merit in the argument that retroactive application of the Act "unconstitutionally disturbs plaintiff's vested property right in his cause of action," for it does not destroy the cause of action but merely clarifies on whom the burden of proving a claim rests, a matter left undecided in *Halphen.*

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[21] 565 So.2d 487 (La.App. 2d Cir.), *writ denied,* 569 So.2d 959 (1990).

[22] *Id.* at 490.

[23] 546 So.2d 229 (La.App. 2d Cir.), writ denied, 551 So.2d 636 (1989).

[24] *See Lavespere,* 910 F.2d at 182-83.

[25] *Coco v. Winston Industries, Inc.,* 341 So.2d 332, 336 n. 1 (La.1976); *St. Tammany Manor, Inc. v. Spartan Bldg., Corp.,* 509 So.2d 424, 428 (La.1987).

While the applicability of the LPLA was not raised in the district court or in briefs to this court, the question of burden of proof was inextricably bound to the merits of the summary-judgment motion. Our affirmance of the district court may rest on reasons not advanced by that court, although reversal may not be.[26] Because our opinion applies only to causes of action arising more than two years ago, and because the Louisiana Supreme Court has denied writs in *Berry*, we do not consider this such an exceptional case as to warrant certification of the retroactivity issue to the Louisiana Supreme Court.

For these reasons and because we think that the Louisiana Supreme Court would reach the same result as we did in our original opinion, the motion for rehearing by the panel is

DENIED.

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[26] *E.g., Church of Scientology of Calif. v. Cazares*, 638 F.2d 1272, 1281 (5th Cir.1981). *See generally*, 10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2716 (1983).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-4208

JAMES R. LAVESPERE,

Plaintiff-Appellant
Cross-Appellee,

and

LIBERTY MUTUAL INSURANCE CO.,

Intervenor-Appellant
Cross-Appellee,

versus

NIAGARA MACHINE & TOOL WORKS,

Defendant-Appellee
Cross-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

(Filed March 26, 1993)

ORDER:

IT IS ORDERED that appellant's motion for relief from judgment under Federal Rules of Civil Procedure (60b) is DENIED.

/s/ Edith H. Jones
UNITED STATES
CIRCUIT JUDGE